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R E P O R T S
O F
C A S E S

Determined in the
Court of King's Bench,

TOGETHER

With some other CASES ;

FROM

Trin. 12 Geo. I. to Trin. 7 Geo. II.

WITH

TABLES of the NAMES of the CASES and
of the PRINCIPAL MATTERS.

In Two Volumes.

VOL. I.

BY

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12



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Term. Trin.

12 Geo. I. 1726.

Twiford and Huggins.

THIS was an Action of Debt against the Warden of the Fleet for an Escape. The Defendant pleads that he is an Officer of the Common Pleas, *ratione cujus attendentia sua indies requiritur* in that Court. To which the Plaintiff demurs. Exception was taken to the Plea, for that he does not say he does every Day attend. But the Court took a Difference between such Officers, as in the Case at Bar, whose Attendance the Court have a Right to *Virtute Officii*, and such Officers, who attend only casually, as Attornies, and Clerks to the Prothonotaries; for the first may plead such a Plea as the present one, but the other must say, they do every Day attend; accordingly the Court gave Judgment for the Defendant.

When an Action is brought in the King's Bench against an Officer of the Common Pleas, what shall be a good Plea of Privilege to such Action.

Anonymus.

A Writ of Error was brought upon a Judgment given in the County Palatine of Durham. Exception was taken to it, for that it had not the Continuances from one Session to another. As in Writs of Error on Judgments in the Common Pleas, there must be the Continuances of the Action from one Term to another. Which Exception was allowed. However the Court did not reverse the Judgment, but awarded a *Certiorari* in order that the Continuances might be certified.

When Actions are brought in Counties Palatine, how far the Continuances must be entered up from one Session to another.

B

Term.

Term. Mich.

13 Geo. I. 1726.

The King *and* The Occupiers of Land in Burrough-Fen.

Construction upon that Part of the Statute of 43 Eliz. 2. which allows the making one Parish to be Contributory to another.

AN Order of two Justices was made upon the Occupiers of Land in Burrough-Fen for the Relief of the Poor of the Parish of St. John Baptist. The Exception, that was taken to it, was, that the Statute of 43 El. only gives two Justices a Power of charging any other of other Parishes within the Hundred, in case where a Parish is overburdened with Poor; but it does not appear by this Order, that the Occupiers of Land in Burrough-Fen are of a different Parish from that of St. John Baptist; therefore non constar that they have pursued the Authority given 'em by that Statute. Accordingly the Order was quashed.

Barker *and* Wharton.

When Prohibitions go to the Admiralty Court, the Difference which there is between such of them as are granted before Sentence and such of them as are granted after.

A Matter of a Ship libels in the Admiralty Court for his Wages, and recovers there. A Prohibition was moved for, for that it does not appear they had Jurisdiction, in as much as 'tis not said in the Libel that the Contract was made *infra altum mare*. But the Court took a Difference between where a Prohibition is moved for before Sentence, and where 'tis moved for after; for in the first Case they said it must appear they have a Jurisdiction upon the very Face of the Libel; but in the other it must appear upon the Face of the Libel that they have none. An Instance of the first sort is this; Where a Prohibition is moved for before Sentence, 'twill not be enough for the Libel to lay the Contract to be made *infra Jurisdictionem maritimam*, but it must appear to the King's Court to be so indeed, as by laying it *infra fluxum et refluxum maris*. Accordingly the Court did not grant the Prohibition.

Storey *and* Atkins.

What shall be a good Averment that one Action was brought for the same Cause as another is.

THIS is an Action of *Indebitatus assumpsit*, and there are three several Counts; the first upon a Promissory Note; the second for Money lent; the third for Money laid out to the Defendant's Use. To the two last the Defendant pleads the general Issue; and to the first he pleads *Action non accrevit infra sex annos*. The Plaintiff replies that true it is, that from the Time of the Promissory Note given to the Time of bringing his Action upon it

it here 'tis above Sir Pears; but says that he levied a Plaint in the Sheriff's Court within five Pears after the Action accrued, upon an Indebitatus Assumpsit for the same Sum as is laid in the Declaration, secundum consuetudinem of London, without alledging in the Plaint what the Ground of the Action was; and avers that he exhibit billam prædict' pro eadem causâ Actionis pro quâ levavit his Plaint in the Sheriff's Court, which Plaint was removed here by Habeas Corpus. To which the Defendant demurs specially; and two Matters were shewn for Cause, one that the Averment was not good, the other that the Plaint was too uncertainly set forth. Judge Fortescue said that the Replication was naught; for the Causes of Action were intirely different, and then no Averment can help it. The Causes of Action, he said, are different, in as much as the one is brought upon the Statute of the 3d and 4th of Queen Anne, Ch. the 9th, the other at Common Law. This Action is brought upon that Statute, because the Promissory Note is laid in the Declaration, whereas at Common Law it could only have been given in Evidence. But he said, in the Plaint the Plaintiff had only proceeded at Common Law. But as to the Objection, that the Plaint was too uncertainly set forth in its being only generally laid secundum consuetudinem of London, he said, if the Action here had been at Common Law, that would have been good. For he remembered a Case adjudged here about three Pears ago, where the setting out a Plaint by Concessit solvere secundum consuetudinem was allowed to be good. But the other three Judges were of different Opinion as to the first Point. For they said a different Cause or Nature of action was not given by the Statute, only a new and shorter Remedy; therefore tho' the Plaintiff has declared here according to the Statute, and taken Benefit of it, yet as the Statute did not take away the old Method, the Plaint might very well be according to that, and the Identity of the Action still the same. They said farther, if the second Point was determined, concerning the Concessit solvere secundum consuetudinem being good, without setting out the Custom, it put the Matter beyond all Question. Accordingly Judgment was given for the Plaintiff. Vide the Case of Finch and Lamb, Cro. Car. 294. where 'tis said that the Plaint and Action differing in the Sum make not different Causes of Action, which was said by the whole Court in this Case.

What shall be a good setting out a Plaint in an inferior Court.

Griffin and Scott.

Plaintiff brings an Action of Trespass against the Defendant for entering into his Land. Defendant pleads an Entry and Distress for Rent. Plaintiff replies that Defendant continued upon the Land with the Distress six Days, and had eight Bailiffs there. To which Defendant demurs. But Judgment was given for the Plaintiff. For the Court said, that by the Common Law a Person that distrains is obliged to carry off the Distress immediately, and put it into a Pound Covert or a Pound Overt, and not detain it upon the Land, and the present Case is not within the Statute of 2 W. & M. 5. And Judge Reynolds said, that the very Reason why Shocks of Corn could

How far a Distress is necessary to be carried off the Premises.

could not be distrained at Common Law, was, because they could not be carried off without Damage to the Tenant, which implies that a Carrying off of the Distress is necessary.

Whight and Clever.

How far a Rejoinder shall be said to be a Departure from the Plea.

THE Plaintiff brings an Action of Debt upon a Bond; Defendant pleads the Condition, which was, that he should execute such an Office without the Assistance of the Plaintiff, and says that he did execute it without his Assistance; Plaintiff replies that he did not execute it without his Assistance; Defendant rejoins, and says that if the Plaintiff did give him his Assistance, 'twas voluntary. To which Plaintiff demurs. And the Demurrer was held to be good, for that the Rejoinder was a Departure from the Plea.

Farding and Baker.

How far an Information must be brought in the proper County.

AN Information was brought upon the Statute of 21 H. 8. for Non-Residence; and it was moved in Arrest of Judgment, that the Information was brought in the King's Bench, whereas it ought to have been brought before the Justices of Assize in the County where the Cause of Action lay, by the Statute 21 Jac. And the Case of *The King and Gaul* was cited out of *Salkeld* to that Purpose. Accordingly the Court gave Judgment for the Defendant.

Frescobaldi and Kinafton.

When an Infant is made an Executor, and an Action is brought against him in that Right, how far he must appear by Guardian.

AN Action of Debt was brought by the Defendant in Error in the Common Pleas against the Plaintiff and another as Executors, and Judgment thereupon. Writ of Error is brought and the Error assign'd was, for that the Plaintiff in Error was an Infant and appear'd by Attorney, whereas he ought to have appear'd by Guardian, as 'tis adjudg'd in 2 Cro. 420. This Case was thought to have a good deal of Difficulty in it; accordingly it stood over.

Braxton and Dyke.

How far it shall not be necessary that a Person shall appear by Attorney.

How far a Writ may be executed on the Day of the Return of it.

THIS was an Action upon the Case in the Common Pleas. Writ of Error was brought, and one Error assign'd was, that 'tis not said that he appear'd by Attorney; but the Court said that then they would intend that he appear'd in Person. Indeed they admitted that if the Surname of the Attorney had been only mentioned without the Christian Name, there inasmuch as it appears that he came by Attorney, and there is no Attorney mention'd, that is a good Error. Another Error was assigned, and that was in the Writ of Inquiry, viz. that the Writ of Inquiry was executed on the Day of the Return, and that it does not appear 'twas executed during the sitting of the Court, after which Time the Jurisdiction of the Sheriff as to that purpose ceases. But this Exception the Court likewise

wife over-ruled, for they said, they would not admit of any Frac-
tions in a Day.

The King and Pusey.

THE Defendant was indicted at the Old Baily, and Motion was made for a Certiorari to remove the Indictment here, for that he was a Person of Distinction; but the Court said they would never do it upon that Account, for that would occasion great Confusion. They said, in some Cases they did grant 'em; as where it appear'd that the Fact would not support an Indictment. As 'twas done in the Case of Sir Humphry Mackworth, who was indicted at the Old Baily for Forgery; for that he, being Governour of a Company set the Seal of the Company to a Deed without Authority; there, as it appear'd to the Court, that that Fact was not indictable, they did grant it.

How far a
Certiorari
shall not re-
move an In-
dictment
from the Old
Baily.

Anonymus.

Judge Fortescue in this Case said, that where a Certiorari goes, the very Record itself is to be remov'd, in all Places except London, where they are only oblig'd to send up the Transcript. Which was not denied.

How far a
Certiorari
shall remove
the Record
it self, and
not barely
the Tenor
of it.

Castle and Richardson.

THE Plaintiff was chosen Chapel-Warden to a Donative, and was prosecuted in the Ecclesiastical Court for not taking his Oath of Office; upon this he moved for a Prohibition, in as much as the Chapel is a Donative, and not under the Ordinary's Jurisdiction. But the Court were of Opinion, that tho' a Chaplain or Parson of such Donative, is not subject to the Deprivation or Suspension of the Ordinary, but the Donor is only Visitor in such Case; yet as to the other Officers, they are under the same Jurisdiction of the Ordinary, as in other Places; for the Parson or Chaplain the Donor only puts in, not the other Officers. They said a Parish-Church might be a Donative. So no Prohibition went.

How far the
Officers be-
longing to a
Church
which is a
Donative are
under the
Jurisdiction
of theordi-
nary, not-
withstanding
the Chaplain
himself is
not.

Fortescue Aland and Mason.

THE Plaintiff brings a Writ of Error in the King's Bench in Ireland to reverse a Common Recovery suffer'd in the Common Pleas there, under which the Defendant claims; the Defendant pleads there his Nonage, and Judgment is given against the Plaintiff. Upon this he brings another Writ of Error here, complaining that that Plea was allow'd wrongfully, and the Defendant pleads the same Plea. But the Court resolved that that Plea was not good, for they said that the Allowance of that Plea, would be admitting that Thing to be right, which is complain'd of as an Error in the Judgment, and whether 'tis so or not, till they have look'd into the Judgment, they cannot determine. So they said would it be in case a Fine had been levied in the Common Pleas there, and a Writ of

How far a
Plea shall
not be allow-
ed of by Rea-
son that it
falls within
the Rule,
Quod non
potest adduci
exceptio
ejusdem rei,
cujus petitur
dissolutio.

of Error brought there into the King's Bench, to which the Defendant should plead Nonclaim, yet in such Case if upon a Writ of Error here the same Plea should be pleaded, they would set it aside. Now in the Case at Bar they said they could not yet possibly tell whether the Plea of Nonage in the Writ of Error in Ireland was allowable or not, and therefore they could not allow it in this Writ of Error. For suppose the Action in Ireland had been a Writ of Dower, in which Nonage is not allowed, and the Defendant had pleaded it there, should such a Plea here be a Bar to this Court's looking into the Judgment? That they said would be against the known Rule of Law, Quod non potest adduci exceptio ejusdem rei cujus petitur dissolutio. Accordingly the Court set the Plea aside.

Goodright and Pullen.

What Words
in a Will
give an E-
state-Tail,
and not
barely for
Life only.

THIS was a special Verdict given upon an Assentment. And the only Point of Law that came before the Court in this Case was upon the Words of a Will, which were these: I give and bequeath unto Nicholas Lyng the Lands in Question for and during the Term of his natural Life, and after his Decease to the Heirs Male of the Body of him lawfully begotten and his Heirs for ever; and if he die without such Heir Male, then he limited several Remainders over. The Question in this Case was, Whether Lyng had an Estate in Tail or for Life devised to him? And 'twas strongly objected on the Part of the Plaintiff, that 'twas an Estate for Life and not an Estate in Tail. For it was said by the Words, his Heirs, were meant the Heirs of the Issue Male, and that tho' the Words Heirs Male were generally put, and in the Plural Number, yet it was said one Heir Male of his Body was only intended, and that appear'd from the subsequent Clause, namely, and if he should die without such Heir Male, which is in the singular Number. But the Court were of a contrary Opinion; they said it was very true if this was so, that one Issue Male was only intended, Lyng would be only Tenant for Life, and the Remainder-Man a Purchaser. And they took the same Distinction as there is in Shelly's Case, 1st Report, fol. 104. between a Remainder limited upon an Estate for Life, to the Heirs Male of the Body of the Tenant for Life, and where 'tis only limited to the Heir Male. For in the first Case they said the Heirs Male take by Descent, and consequently the first Person who is to take has an Estate-Tail; but in the other Case, the Heir Male of the Body of the Tenant for Life takes by Purchase, and the first Person who is to take has but a bare Estate for Life. But in the Case at Bar the Court said the Words were properly Words of Limitation. They said too, if these Words had been in a Deed, as they are in a Will, 'twould have been beyond all Question, that an Estate-Tail had pass'd to the first Taker. And they laid it down for a Rule, that Words in a Will shall give the very same Estate as such Words in a Deed would, unless the Intent of the Party can be discover'd to the contrary. Accordingly they adjudg'd that Lyng should take an Estate-Tail, Remainder to his Heirs in Fee, and gave Judgment for the Defendant. N. B. A Case

In More, fol. 124. was cited to shew that the subsequent Words, Heir Male, make no Alteration in this Case; and that Case was, of an Estate being devised to a Man and his Heirs Male of his Body, and if he should die without Heir of his Body, that the Land should remain to a Stranger; where 'twas determin'd that an Estate in Tail Male only passed, notwithstanding the subsequent Words; which is a stronger Case than the Case at Bar; for here are plain relative Words, namely, such Heir Male, which evidently refer to and shall be explain'd by the foregoing Words.

Goodtitle and Rogers.

THIS was an Ejectment, wherein the Defendant pleads Antient Demesne; a Motion was made to let aside the Plea, in as much as there is no Affidavit made to verify it; whereas the Act for the Amendment of the Law says, That no Dilatory Pleas shall be allowed unless verified by Affidavit. But the Court said, this was no Dilatory; 'twas only a Plea to the Jurisdiction of the Court, and therefore need not be verified by Affidavit.

How far the Plea of Antient Demesne need not be verified by Affidavit.

The King and Chipping-Norton.

A Motion was made for a Certiorari to remove an Indictment of Felony that was found in a private Jurisdiction, in order that it might be tried in the County. And the Reason given was, for that Affidavit was made that this was an Indictment for Felony against a Clergyman, for only taking a handful of Hay out of a Barn, which 'twas sworn was but of the Value of a Penny, and they swore 'twas nothing but a malicious Prosecution. And the Case of The King and Powel was cited where a Certiorari went to remove an Indictment out of the Sessions of the County of Sarum. The Court said they never did grant such Certiorari, but upon a particular Occasion. But they made a Rule to shew Cause. And at the last Day of the Term, they granted it.

How far a Certiorari shall be granted to remove an Indictment of Felony.

Dawkins and Burridge.

THIS was a Writ of Error to reverse a Judgment given in the Common Pleas; and the Error assign'd was, that the Suit there was by Bill, as in the Case of a privileg'd Person of that Court, whereas it ought to have been brought by Original, according to the usual Course of that Court; for tho' this was an Action against a Member of the House of Commons; yet in as much as 12 W. 3. c. 3. on which that Action was grounded, does not allow the Courts of Westminster-Hall to issue out any different Process than according to the Course of each respective Court, they have no Jurisdiction to proceed in any different Manner than against a common Person. But the Court said that a new Jurisdiction is given 'em by that Act, different from what they can exercise against a common Person; and this they said not only was clear from a Session in

How far a Member of Parliament is to be proceeded against by Bill only, and not by Original.

in it to that very purpose, but was strongly implied too from the last Proviso in it; which says, that they shall not proceed in any real or mixed Action in any different Manner from that, which they proceed against common Persons in; which strongly implies that in personal Actions, as this was, they may. Accordingly Judgment was affirmed.

The King and Rich.

How far an Instrument cannot be produced in Evidence for want of its being Stamp'd in due Time.

THIS was a Trial at Bar upon an Information in the Nature of a Quo Warranto to know by what Authority the Defendant exercised the Office of Burgess. Four Issues were joind. And when he came to the last, which was, whether he was duly sworn and admitted into the Office, he produc'd his Admission; but it appearing by the Witnesses, that the Stamps were put to it a Month or two after 'twas drawn up, the Court said it could not be given in Evidence, by a Statute in the 9th and 10th of King Will. c. 25, 59. which says that no Admission shall be given in Evidence of a Person's being admitted into an Office of Burgess, unless such Admission has double Stamps. This same Point, the Court said, was determined in the Case of Dr. Gastrill, Bishop of Chester, and Peploe. But if the Penalty be paid, and a Receipt taken from the Stamp Office, before 'tis produc'd in Evidence, 'tis very allowable. The Court ordered too the Jury to find all the Issues for the King, in as much as the Defendant had fail'd in one. And this Point, they said, was settled in the Case of Pindar and Earle upon a Writ of Error brought into the House of Lords. They said too, that when once a Person has entered upon Evidence by Deed, he cannot, if he fails of that Evidence, afterwards go to Parol Evidence of that Fact. Indeed the Attorney General said that if they had not produced this Evidence by Deed, he did not know but they might have been admitted to have given Parol Evidence of it. Accordingly Judgment of Ouster went.

Term.

Term. Hill.

13 Geo. I. 1726.

The King *and* The Inhabitants of Rowley.

A Bill was presented for not repairing its Highways; and in order to quash the Presentment, 'twas objected, that every Parish of common Right is bound to repair its Highways, and they ought not to throw the Charge upon a Will, unless by Custom, Contract, &c. no more than upon a particular Person in the Parish, for there may be many Wills in one Parish, and therefore as such Custom, &c. was not set forth in the Presentment, it ought to be quash'd. But the Court said it did not appear there was more than one, and therefore they would intend them coextensive.

How far a Vill and a Parish shall be said to be coextensive.

Radley *and* Rudge.

THIS was an Action of Trover. And Exception was taken to the Declaration, for that it was too general; it being only unam peciam of black and white Tabby, and it does not express the Quantity of Yards. And they cited a Case lately adjudg'd, where parcellam Papyrae was held to be bad. And this Case the Court allowed; but they said in the first Case, a Piece of Silk contains a certain Quantity; but a Parcel does not.

How far the Goods, which an Action of Trover is brought for, shall be said to be described with sufficient Certainty.

The King *and* Seymour.

THE Defendant in an Information pleads in Abatement, that he is a Surgeon, and not Generosus. The Counsel for the King moved to amend; but it was objected, that the Information cannot be amended; because in order to amend, the King must pay Costs, which it would be derogatory from his Honour to do. But the Court said, when the King comes for a Favour he may pay Costs; accordingly they let him amend upon Payment of Costs or giving an Impar lance; the Counsel for the King chose to pay Costs. And they cited a stronger Case than this, namely, The King and The Corporation of Malmesbury, Pasch. 9. of this King, where the Amendment was in the very Name of the Corporation.

When Leave is given to amend an Information, what Terms it must be upon.

The King and Ward.

What shall
be said to be
a Forgery at
Common
Law.

What shall
be said to be
a good In-
formation
for Forgery.

THE Defendant being convicted in an Information for Forgery, mov'd several Things in Arrest of Judgment; First, That this Information was laid at Common Law, and Informations of this Sort for Forgery did not lie, but where the Thing forg'd was a Writing under Seal; and this was only a Forgery of an Order from the Duke of Buckingham to Ward. But the Court was of Opinion that this was an Offence indictable at Common Law; for they said equal Prejudice might attend another in the having his Order or Receipt forg'd, as in the having his Deed forg'd or other Evidence. And that this was a Matter never questioned, appears from several Cases, wherein the Counsel have taken remote Exceptions to such Indictments, but never mov'd this in Arrest of Judgment. As in 1 Salk. 347, 406. They did indeed admit the Case in Noy 99 to be Law, where the Obligee's changing the Word Libris to Marcis was held to be no Forgery; but they said, the Reason of that was, because such Alteration could not be to the Prejudice of any Person but the Obligee himself. And they said Forgery was the Alteration of any Writing, which may be given in Evidence, by the means of which another may be prejudiced. The second Exception was, that the Offence was not sufficiently laid in the Indictment; for the Words are, Johannes Ward obligabilis existens ad deliberanda trecentum dolia Alumni, Anglice Tuns of Allom, Duci de Buckingham, ad certum diem præteritum, ipse idem Johannes machinans & intendens ad evitandam deliberationem prædictam, committed this Forgery on the first of February 1724. Now they objected, that it did not necessarily appear that the Defendant was chargeable at the Day he committed the Forgery, and if so it was no Forgery indictable, because at the Time of the Forgery there must be a Possibility of a Prejudice coming to another. But the Court said that the Words Ipse idem Johannes were Surplusage, and they would throw them out; and then they said, they must offer Violence to Common Sense and Grammar, to give any other Meaning to the Words than that he was chargeable at that Day; for how could he intend to avoid the said Charge by the Forgery, if there was not any Charge upon him at that Time? A third Exception was taken to the Publication; but the Court said they did not care what became of that; for in the Information there are two distinct Charges, one of Forging the Order, the other of publishing it; and if the first be made out, that is enough for them to give Judgment upon. A fourth Exception was taken to the Word Dolum, for they said it only signified a Tun in Measure and not in Weight; but it was over-ruled, several Precedents being cited, wherein it was used in the present Sense. Fifthly, To the Word Contrafecit for Counterfeiting, where the Word should have been Controfecit; but this it was said was the constant old Word. Sixthly, To a Disagreement between the Venire and the Distingas; in the one, the Issue being joined between the King and the Defendant, in the other between the Attorney General and him. That Exception was over-ruled likewise.

Wats

Wats and Goodman.

THE Defendant pleads a Plea in Abatement as a Plea in Bar, by concluding Ideo petit quod declaratio cassetur; upon which the Plaintiff demurs generally. And the Court said, such a general Demurrer is good. And Judge Reynolds declar'd that in no Case a Person is oblig'd to demur specially upon a Plea in Abatement, for 'tis not within any of the Statutes for the Amendment of the Law.

How far the Plaintiff need never demur specially to a Plea in Abatement.

The King and Lewis.

A Motion was made to quash an Information taken at the Sessions. But the Court said, they never quash'd Informations, for they may be amended.

How far the Court never quashes an Information.

The King and The Inhabitants of Paulsperry.

A Motion was made to quash an order of Sessions; the Fact was in this Manner; A Father dies leaving several Children, and the Mother goes with them and gets a new Settlement; upon this the Justices order, that the Children shall be remov'd to the Settlement of the Father; and now it was mov'd that this Order might be quashed. Which the Court accordingly did; for they said, that by the Law of Nature, a Mother is as much oblig'd to take care of her Children as a Father is; and therefore they ought not to be removed from her. And they said, that the Case of St. George's Southwark and St. Catherine's was a Case in Point; and that was in the first of the King.

How far the Settlement of Children changes with the Settlement of the Mother, as well as it does with the Settlement of the Father.

The King and The Inhabitants of Grimston.

THIS was an Order of Removal; and the Exception that was taken to it was, that the Removal was to the Parish of Hamlet of A. which was uncertain. The Court said, that indeed a Vill and a Parish they would intend coextensive; but that a Hamlet was nothing else but Part of a Parish. So they quash'd it.

How far an Order of Removal shall not be good, by Reason of the Uncertainty of the Place, to which the Persons remov'd are sent.

Term. Paschæ

13 Geo. I. 1727.

Tyrrell against Sir Clobery Holt & John Hopley.

Which Side
shall begin
with produ-
cing their
Evidence
first.

THIS was an Issue out of Chancery that came to be tried at the Bar. And it was whether one Mrs. Bruerton was of sound Memory at the Time of her executing several Deeds; and because the Execution of the Deeds was at several Times, there were four Issues, but each of them turned upon that single Question. The Defendant was to prove that she was of sound Memory; the Plaintiff that she was not. And the Counsel of each Side argued who should produce their Evidence first. And the Court took this Difference, that if there is one Affirmative in any of the Issues, the Plaintiff shall first go through his Evidence as to all of them; but in this Case the Affirmative thro' the whole lies upon the Defendant, and therefore he shall go first through his Evidence.

Shippman and Lethalier.

When there
are two Re-
turns made
to a Certio-
rari contrary
one to the o-
ther, which
Return shall
be taken to
be true.

THE Plaintiff in Error assigns for Error Want of a Writ of Inquiry, and takes out a Certiorari to verify it; and the Custos Brevium returns that there was none filed of that Term, which the Certiorari went to be informed of. Subsequent to this the Defendant in Error files it as of that Term, takes out a Certiorari himself and has a Return made, that it was filed. Upon this the Counsel for the Plaintiff moves that the second Certiorari may be quashed. The Court said, that they ought to have entered a Caveat to have prevented its being filed; but however made a Rule to shew Cause.

Mackleed and Slead.

What shall
be said to be
a good Bill
of Exchange.

UPON a Writ of Error the Question was, whether the present Writing was a Bill of Exchange; and the Words of it were to this Effect, Pray pay to such a one or Order within a Month after the Date hereof nine Pounds ten Shillings, as is a Quarter's Rent, due from the 24th of June to the 25th of September next following, by Advance; Witness my Hand, &c. Dated the 24th of May 1724. And the Court affirmed the Judgment in the Common Pleas, adjudging that it was a good Bill of Exchange. For they said, if it had gone no farther than the nine Pounds ten Shil.

Shillings, 'tis very clear it would have been so; and the Words subsequent have no other Operation, than to shew the Person upon whom 'tis drawn, how he should reimburse himself. Indeed if these nine Pounds ten Shillings were to issue out of the Quarter's Rent, they admitted, 'twould not be a Bill of Exchange; in as much as it would have been wholly uncertain, at the Time the Money contained in the Bill was to be paid, whether any such Rent would ever be due. And a Bill of Exchange must be peremptory and good at all Events. And that is the Reason the Court said of the Case of Josling and Lascer, Hill. 11 Anne, where a Man orders another to pay to such a one 1945 l. out of the Money in the Defendant's Hand, belonging to the Proprietors of the Devonshire Mines; and that was adjudged no Bill of Exchange; because it depends upon a Contingency, whether the Person on whom the Order was made should pay the Money or no.

The King and Dormer.

A Rule was made upon the Defendant to shew Cause why an Information should not go against him for a Libel, made upon one Mr. Carter, a Justice of Peace in Oxfordshire, which insinuated that Mr. Carter had lately forsworn himself in an Affidavit. And the Cause that he shewed was, that the Fact contained in the Libel was true; and therefore he hoped the Court would not allow him this summary way of Proceeding, but leave him to his Indictment or Action upon the Case. And Mr. Strange cited the Case of The King and Bicartton, Hill. 8 Geo. 1. where an Information was refused for the same Cause. In that Case the Defendant was charged with personating Dr. Crow, and taking a Fee as representing him; the Defendant made Affidavit of the contrary; and the Court would not grant the Information. But the Chief Justice said, he did not believe that Case was true. And he said, in all Cases Informations for Libels go, unless you can shew the Court some probable Cause for them to believe that you did not publish it. Now if you had denied it, it would have signified nothing; for then Affidavit stands against Affidavit, therefore the Information shall go, that the Fact may be tried. And Judge Fortescue said, that it would be a strange Thing if a Man should be allowed to justify, when an Information is pray'd against him, and should not be allowed to justify in the Information itself, when it is gone. Accordingly the Information was granted.

How far an Information is the proper Remedy for a Libel.

Stanton and Squibb.

THIS was an Action for Words. And the Declaration set forth that the Plaintiff was a Brewer; and that the Defendant speaking of him said, he is a pitiful Fellow and a Rogue, and has compounded for five Shillings in the Pound; and upon that the Plaintiff concludes that he was damaged by them to the Sum of Upon this the Defendant dequits. And the Counsel

What Words are Actionable which are spoke of a Tradesman.

fel shewed for Cause, first, That it did not appear, that he was speaking of him in his Trade; secondly, That he ought to have shewn some special Damage. But Judge Fortescue said, that he has heard my Lord Chief Justice Holt often say, That he would take the Words always in a common Sense, and if they imported any Fact that might probably prejudice the Person they were spoke of, he would look no farther. And the whole Court gave their Opinion, that these Words were Admonable.

Cockman and Mather.

How far an
History can-
not be given
in Evidence.

THIS was a Trial at Bar, concerning the Right of Visiting University-College in Oxford. One of the Issues in this Case was, Whether King Alfred was Founder? And the Counsel for the Plaintiff would have given in Evidence several Histories as to this Point. But the Chief Justice declared, that such Evidence is never admitted, unless in Proof of a Point concerning the Government; the rest of the Court did not deny it. Accordingly 'twas waived.

Shippman and Lethalier.

Vide p. 12.

How far se-
veral Certio-
raries may
be taken out
before In
nullo est Er-
raturum is
pleaded.

THIS Matter now came on again, and the Fact was in this Manner; This was a Writ of Error upon a Judgment in the Common Pleas. And the want of a Writ of Inquiry being filed was assigned for Error. Upon which the Plaintiff took out a Certiorari to verify that Error. And the Custos Brevium returns, quod non habetur assilatio talis brevis in crastino ascensionis Domini in prædicto Termino Paschæ, which was the Term the Certiorari went to be informed whether there was such a Writ filed of. Before In nullo est erratum pleaded, the Defendant takes out a Certiorari for the same Purpose, and has a direct contrary Return made to it. Upon which the Counsel for the Plaintiff would have had the Judgment reversed, saying, That they had verified their Error; and whatever contrary Return is afterwards made, it is not to be regarded. But the Court said, that as here were two inconsistent Returns, they would certainly take that, which made in Affirmance of the Judgment. Another Point the Court agreed to, that the Parties may take out as many Certioraries as they please, before In nullo est erratum pleaded; but after that they cannot take any out but upon Motion; and those the Court will grant ad informandam Conscientiam Curie.

Aslett and Vincent.

How far the
Plaintiff may
reply de in-
juria sua
propria abs-
que tali cau-
sa, by Rea-
son that the
Plea does
not contain
in it Matter
of Record.

IN Trespass the Defendant pleads, that he took the Goods by way of Distress, and as they were not replevied within five Days after Notice, he sold them secundum formam Statuti. The Plaintiff replies, that he took the Goods de injuria sua propria, absque tali causa. Upon which the Defendant demurs. And now shews for Cause, that as his Plea was mixed with Matter of Record, as well as with Matter of Pais, the Plaintiff ought not to have replied generally absque tali causa; but

but should have traversed some particular Part of his Plea. And Crogate's Case in the eighth Report was cited to this Purpose. But the Court said, that this Plea was not mix'd with Matter of Pais and Matter of Record; for a Statute is not Matter of Record but a publick Law.

Term. Trin.

13 Geo. I. 1727.

Conset and Warren.

THIS was a Writ of Error upon a Judgment in the Common Pleas, in an Action of Debt upon a Bond. where Nil debet may be pleaded. And the Declaration set forth, that an Agreement was entered into between the Plaintiff and Defendant, for the Plaintiff's transferring some Stock to the Defendant, and that the Defendant should pay 1200l. for it, and accordingly the Defendant entered into a Bond for the Payment of the Money. The Plaintiff did deliver the Stock, upon which he demands the Penalty of the Bond. The Defendant pleads Nil debet; to which Plea the Plaintiff demurs. And the Court held the Plea to be nought; for they took this Distinction; that where-ever an Action is brought ultimately upon a Specialty, though mixed with Matter of Pais, the Plea of Nil debet is not allowed; but where the Action ultimately arises upon Matter in Pais, though mix'd with Matter of Specialty, the Plea of Nil debet is good. And they relied upon the Case of Smith and Whitehead, Trin. 9 Geo. 1. where this Plea was not allowed in an Action brought by the Plaintiff as Assignee of a Bail-Bond; which they said was a Case in Point. Indeed in the Case of an Action of Debt brought upon an Indenture of Lease for Rent, 'tis allowed; but that Case falls under the second Part of the Distinction, for there the Demise, which is Matter of Pais, is the Ground of the Action; so in an Action of Debt for an Escape Nil debet is a good Plea; for the Act of Escaping, not the Judgment, is the Principal Ground of the Action. Accordingly the Judgment below was affirmed.

Blake

Blake and Dodemay.

What shall
be a good
Scire Facias
brought by
a Husband
and Wife up-
on a Judg-
ment belong-
ing to the
Wife dum
sola.

What shall
be a good
Joinder in
Demurrer.

THIS was a Writ of Error upon a Judgment on a Scire facias, brought by the Plaintiffs as Husband and Wife, upon a Judgment obtained by the Wife dum sola. The Defendant demurs to the Scire facias, and shews for Cause specially, that there is no Venue laid of the Place where they were married, nor is there any Day mentioned whereon they were. And the Counsel said that where-ever a Matter traversable is alledg'd, the Time and Place where that Matter was done, must be alledg'd, unless where the Matter is Personal; as the taking upon a Person the Order of Knighthood, &c. for there indeed the Place need not be laid; for those Matters shall be tried where the Writ is brought. The Court thought there was a good deal of Weight in the Objection; but as there were a great many Precedents shewn of Scire facias's brought in this very Form, though no Case was cited, where they were ever demurr'd to upon this Exception, they allow'd it to be good. Another Exception that was taken was, that the Defendant in his Demurrer had concluded & ideo petit quod narratio prædicta cassetur; but the Plaintiff in his Joinder in the Demurrer replied, ob causam prædictam breve non debet cassari; so that they said the Plaintiff had not answer'd the Defendant's Plea. But the Court said, that a Scire facias was a Writ and no Declaration; so that you have concluded wrong; and now you take an Exception to their not having follow'd you, which if they had done, it would have been a Discontinuance. Accordingly Judgment was affirm'd.

Jennings and Mott.

Where an
Information
shall be
granted for
a Battery
norwith-
standing the
Fact is deni-
ed.

AN Information was moved for against the Defendant, for coming a sporting on the Plaintiff's Ground, and beating him in a very grievous Manner, because he only came up to him and desired him to go off. The Defendant's Affidavits directly contradicted the Plaintiff's. And therefore Judge Forrescue said, the Information ought to go, that the Fact might be tried. But the rest of the Court said, the Rule was not so. Indeed in Informations to try a Matter of Right it does hold, because there you have no other Remedy; but in Informations of this Nature you have, by Indictment at the Sessions; and therefore where the Fact is contradicted positively, the Court does not grant them. However, because it appear'd that the Defendant was a Man of Interest in the County, and the Plaintiff a Poor Man, and as the Plaintiff had made Application to a Justice of Peace, and he would not take any Notice of it, the Court did grant it.

Webb and Urlin.

A Motion was made to plead double in an Action qui tam. But the Court looked into the Act for the Amendment of the Law, which allows these Pleas upon Motion, and found an express Proviso in it against allowing them in Actions upon penal Statutes.

How far Pleading double shall not be permitted of in Actions to be brought on Penal Statutes.

Doyley and Sherrington.

ON Motion to set aside a Sham-Demurrer to a Scire Facias to assign Errors. The special Causes of Demurrer are, first, that it does not appear by the Scire Facias whether the Judgment in the Common Pleas was by Original or Bill, and as it was an Attorney of that Court that was sued, it must have been by Bill. The second Cause was, That it ought to have been Sciri Facias, and not Scire Facias. And the Court said, as it was evident that the alledging such Errors as these could be only for Delay, they would set the Demurrer aside, as they do very often Sham-Pleas.

How far the Court will set aside a Demurrer by Reason of its appearing upon the Face of it to be merely frivolous.

The King and Oneby.

UPON an Indictment preferred against the Prisoner, for murdering one Mr. Gore, the Jury gave a Special Verdict; which was removed into this Court by Certiorari. And after all the Judges had met upon it, the Lord Chief Justice of this Court delivered their unanimous Opinions that it was Murder; Murder he said, was the killing of a Man of Malice prepense. And whether that Malice is express or implied, it is not material. As if a Man should lead a Horse, which he knew was apt to kick, amongst a croud of People, with an Intention to do Mischief, and the Horse should strike any of the People, of which they died, that would be Murder in him; for the Law would supply the Malice. But he said there was no Occasion to look out for Malice implied in the Case in Question; for his Malice express was sufficiently discoverable; and that from two very material Circumstances; the one, when the Deceased desired they might be Friends, his telling him, No, Damn him, he would have his Blood; which he said plainly carried with it Pre-meditation. The other, his staying in the Room when the rest of the Company was gone, and calling the Deceased back, and saying to him, young Man, I have something to say to you; it was true indeed, he said, the Deceased did give the Prisoner ill Words in Return to what he said to him, by telling him, whoever called him a Puppy was a Rascal. But Words are no Provocation. However, that which was the principal Rule, that govern'd this Case, was the same with that, which is the Foundation of Mawgridge's in Keyling's Reports; and that is, that where-ever two Persons fall into a Passion with one another, which Passion carries the Person killing beyond his Reason, (for that the Chief Justice declared to be a necessary Circumstance,) and they agree to fight instantly, that is indeed only

What shall be said to be Murder.

Manslaughter. But where-ever any Act intervenes which shews Consideration and Forethought, that is always Murder. And therefore if two Men have such a Quarrel with one another, and they agree to fight in the Afternoon, and do so, that is Murder. So in my Lord Morley's Case, which is refer'd to in Mawgridge's Case Keyling 129, where my Lord Morley had a Quarrel with another, upon which they agreed instantly to fight, yet because he looked upon his Shoes, and said he was afraid he had a Disadvantage because the Heels were very high, the Court determined that to be Murder; for his doing that Action plainly shewed a Deliberation. So he said, if two fall into such a Quarrel, and the one says to the other, I will not strike you first, but I will give you a Pot of Beer to strike me first, and the other does so, and upon that the Person making the other this Offer, gives him a Blow, with an Instrument likely to occasion Death, or some great bodily harm, by which the other dies, that is Murder. The Nature of the Instrument, the Chief Justice said, was indeed material. And accordingly Turner's Case was agreed to be Law; and that was, that a Master ask'd his Servant what he meant by not cleaning his Mistress's Clogs, and upon that he took one of them, and struck the Servant cross the Head with it, of which he died, that was held to be only Manslaughter. But Gray's Case in Keyling 133. was likewise agreed to be Law; and that was that a Smith struck his Servant with an Iron Bar, for being rude to him, of which Wound the Servant died; which was held to be Murder. The Case in 12 Co. 87. was likewise held to be Law. And so was the Case in Coke's Inst. 296. which are Cases of Manslaughter. And for the Reasons aforementioned the Court adjudged the Prisoner guilty of Murder. Vide Rayley's Case 2 Co. 296. which was allowed by the Court to be Law.

The King and Landen Jones.

How far the Court will give Leave to add a new Interrogatory

THE Defendant had answered to certain Interrogatories for a Contempt of the Court. And a Motion was now made for adding a new Interrogatory; the Counsel of the other Side said, that that was never allow'd. Upon that the Court ask'd M^r. Harcourt, whether it was ever done; and upon his saying there were several Precedents of it, they allow'd it in this Case.

Proude and Willimot.

How far a Person cannot carry down a Cause by Proviso without giving a Rule in the Office for that Purpose.

UPON a Motion to set aside a Trial, for the Defendant's carrying it on by Proviso, without having a Rule for that Purpose; the Court ask'd the Master, whether that was necessary: Upon his saying it was, they let it aside.

Anony-

Anonymus.

ON Motion to quash an Indictment for a Forcible Entry and Detainer; the Exception to it was, that it is only laid in the Indictment, of which House he was possessionatus; and it is not laid what Estate he had in it; and if he was only Tenant at Will or Sufferance, the Statute does not extend to him. Upon this Exception the Indictment was quashed.

How far an Indictment for a Forcible Entry shall not be good by Reason of its not setting forth the Interest which the Party had in the Land.

Anonymus.

A Motion was made to have Leave to amend an Issue, by putting in the Name of the Plaintiff, instead of the Defendant's, upon Payment of Costs, it being not upon Record. The Counsel of the other Side objected, that it was in the Nisi Prius Roll, and that supposes its being first of Record. Judge Reynolds answered, that in Strictness it ought to be so, but every Body knows it is not. Accordingly the Court allowed the Amendment.

How far an Issue may be amended notwithstanding it is entered upon the Nisi Prius Roll.

Webster and Vaughan.

HERE were two Exceptions taken to a Testatum Fieri Facias; the one was, that there was no Fieri Facias first taken out, on which the Testatum was grounded. The other was, that after the Sealing of the Writ, the Attorney fill'd up a Blank in it. The Court admitted both the Exceptions; and accordingly quash'd it.

What shall not be said to be a good Testatum Fieri Facias.

The King and The Borough of Truro.

A Motion was made for an Information, to know by what Authority certain Persons exercised the Office of Burgeses in the Borough of Truro; some that were Aldermen there at the Time of the Election not having Notice of the Election. But the Court said, as it appeared they had continued in their Offices for six Years they would not do it; for it would be a Thing of dangerous Consequence to have Burgeses Elections tried over again after so long a Space of Time for Omissions of Things of that transient Nature. Judge Fortescue said, it had been determined several Times, that for the Omission of giving Notice to one of the Electors, the Court has refused to have their Elections tried over again, where such Omission was by Mistake. And he and Judge Probyn too said they remembered the Case of the Town of Buckingham, where a Man was made an Alderman in an Alehouse, yet as he had continued in the Office for several Years, they would not allow of a new Election.

How far the Court will not grant an Information in nature of a Quo Warranto, by Reason of the Length of Time.

The

The King and Budgel.

How far a
Witness shall
not be exa-
mined before
a Judge in
Criminal
Cases.

A Rule was made upon the Prosecutor to shew Cause why the Trial should not be put off, one of the Defendant's Witnesses not being able without Danger of her Life to appear at the Trial. The Prosecutor offered to allow her Testimony to be taken before a Judge. But the Court said, they never suffer'd it to be done in Criminal Cases.

Anonymus.

How far Li-
berty shall
not be given
to amend a
Plea in
Criminal
Cases.

THIS was an Indictment for not mending a Highway. A Motion was made by the Defendants to amend their Plea; they had pleaded it was a private Way; and they desired to plead the General Issue. But the Court said it was against the Rules of the Court to allow it in Criminal Causes, but upon Consent. So upon their desiring to have a good Jury, and to have a View, the Court said, they could not grant them without Consent.

Anonymus.

What shall
not be a good
Indictment
for exerci-
sing a Trade
without ha-
ving serv'd
an Appren-
ticeship.

ON Motion to quash an Indictment on 5 Eliz. 31. for exercising a Trade which was used at the Time of the Statute, the Person not having serv'd an Apprenticeship seven Years. The Exception to it was, that it charg'd him with exercising a Trade, which was used *infra hoc regnum Angliæ* at the Time of the Act. Accordingly the Court quashed it; for they said there was no such Kingdom now; if indeed the Word *hoc* had been out, they admitted it would have been good; because at the Time of the Act there was such a Kingdom; and that was the Reason why they said they could not reject it, because it is a material Word.

Term.

Term. Mich.

I Geo. II. 1727.

Anonymus.

IN this Case the Court said it is a standing Rule, that a Man shall not have Leave to add a new Count after the second Term; they said also that when a Motion is made to amend a Declaration, the Amendments must either be inserted in the Rule to shew Cause, or the Plaintiff must give the Defendant a Note of them at the Time he serves him with the Rule. Otherwise the Court will discharge it.

How far a Person shall not have here Leave given him to add a new Count after a second Term.

Studley and Stert.

A Man was serv'd with a Latitat returnable die Mercurii the 26th of July, and put in Bail above the Monday following; and whether the Bail was not given too late was the Question. The Court said, that four Days, exclusive of the Day of the Return, was the Time that was allowable for putting in Bail; and though Monday was the fifth Day after the Return, yet, because Sunday was no Law-Day, they thought it was well enough.

Within what Time Bail is to be put in above.

Johnson and West.

IN an Action of Debt upon a Bond, the Defendant pleads Payment of the Money by Force of a Foreign Attachment; the Plaintiff replies that the Defendant was attached before the Day of Payment contained in the Condition, though Judgment was given after the Day. But the Court held the Replication to be ill; for inasmuch as there was a Debt at the Time of the Attachment, though not to be paid then, and in as much as it was to be paid before the Judgment on the Foreign Attachment, the Judgment was well given. And a Case in Roll's Abridgment, Placito 5. was cited to this Purpose.

How far Debt may be bound by a Foreign Attachment, notwithstanding it was not at that Time payable.

Anonymus.

For what
Offences the
Court will
grant an In-
formation a-
gainst a Ju-
stice of
Peace.

THIS was an Information that was mov'd for against a Justice of Peace, who was likewise an Attorney. And the Case was, that a Bailiff had taken a Distress, and continued with it on the Possession; upon that, the Justice sent a Warrant for him, and asked him, why he continued with the Distress on the Possession, telling him, he had sued out a Replevin. The Bailiff told him, the Distress was delivered to him to keep, and he would take care of it: Upon which the Justice sent him to the House of Correction, to continue there, till he should be discharged by due Course of Law. And for this the Court granted the Information; for they said they would never suffer a Man to enforce his Authority as an Attorney, with that of a Justice of Peace.

Chambers and Robinson.

How far spe-
cial Bail
need not be
given in an
Action of
Debt, which
is brought
upon a Judg-
ment.

THE Plaintiff recovered in an Action brought against the Defendant for a malicious Prosecution; upon which Judgment he brings an Action of Debt, and recovers; and upon that Judgment brings another Action of Debt. Now the Question that came before the Court was, Whether the Defendant should give Special Bail in this Case? And the Court determined, that he need only find Common Bail; for they said, that this third Action was only veracious; and for the same Reason that Special Bail should be required in this third Action, it might be required in infinitum; though indeed they said in the first Action brought upon a Judgment, they will allow it.

The King and The Inhabitants of Anow.

How far a
Servant shall
gain a Set-
tlement.

ON a Motion to quash an Order of Sessions. The Case, as it was stated in the Order, was, that a Person had got a Settlement in the Parish of Anow, and after that had let himself to one in another Parish, from Christmas to Michaelmas, and lived with him all that Time; and some time after he let himself to the same Person in the same Parish for a Year, and lived with him only a Quarter; upon which Matter the Justices made an Order on the Statute of the 8 & 9 Will. 3. upon the Parish of Anow to keep him. And now the Question, that came before the Court, was, Whether the Servant's living with his Master for a Year in the whole upon these two several Contracts was sufficient to gain him a Settlement within that Act; or whether it was not necessary, that he should have lived with him for a Year upon that Contract of a Year? It was objected by the Counsel for the Order, that as this was a Law explanatory of the 3 & 4 Will. & Mar. the Words of it ought to be kept close to. The Words of it are, Whereas some Doubts have arisen touching the Settlement of unmarried Persons, lawfully hired into any Parish for a Year; Be it declared, That no such Person so hired, as aforesaid, shall have a Settlement in such Parish, unless such Person shall continue in the same Service during one whole Year; these Words are in the

fourth Session of it. The Case of Redgwick and Dunsford in Salkeld was cited too, where there is an Opinion given, that the Service must be pursuant to the Hiring. But the Court said that this Point had been solemnly settled in the Case of Brightwell and Henry, Hill. 1 Geo. 1. and therefore though there was a great deal to be said of the other Side, they could not go against it. They said too, that Case was within the Letter of that Clause, if not within Common Sense of the Words; and they thought within the Meaning of the Act. For the Act intended to prevent a Fraudulent Practice before made use of, which was, that People would hire Servants for a Year, tho' they were not able and did not intend to keep them so long; now this Act provides against that, by making it necessary, that the Servant shall live with his Master in that Parish a Year; but does not require it should be upon the same Contract. Accordingly they quashed this Order, adjudging the Settlement to be in the last Parish. It was objected farther by the Counsel for the Order, that this second Hiring appeared to be Fraudulent; but the Chief Justice said, they would never collect Fraud upon Facts stated in Orders as special Verdicts, unless specially found, for they will intend, if there was Fraud, that it would have been found so.

How far the Court will not imply a Fraud from Facts stated in an Order, but the Fraud must be particularly found.

Frescobaldi and Kinaston.

Vide p. 4.

THIS was a Writ of Error upon a Judgment in the Common Pleas against two Executors. And the Error assign'd was, that one of the Executors was an Infant at the Time of the Judgment, and that he defended by Attorney, whereas he ought to have defended by Guardian. The Counsel on the other Side said, that they relied upon the Case of Foxwith and Tremayne, which is reported in Vent. 102. and in several other Books. And that was a Case wherein it was allowed, that where there are two Executors Plaintiffs, and one of them is an Infant, he may appear by Attorney. And the Counsel said, that there was no Difference between that Case and the Case at Bar; for in the Case cited, the Infant may be prejudiced (which is the only Reason that can be alledged for a Difference) as well as in the Case at Bar; in as much as he may be amerced pro falso clamore, and suffer other Inconveniencies. And though in the Case at Bar perhaps the Infant may suffer more Damage, than in the Case cited; yet the Quantum of the Damage can make no Difference. But it was resolved by the Court to the contrary. And they said, that the same Reason why Infants shall sue by Prochein amy and defend by Guardian in Matters that concern their own Right, holds here, where they are sued in autre droit as Executors; for they may suffer Damage in this Case, as well as in the other; and therefore it is proper there should be a Person whom they may have Remedy over against. And it has been determined that in case of an Attorney's losing his Client's Cause barely by Mismanagement, there is no Remedy against him. Now they said, that one Inconvenience in the present Case was, that the Infant might suffer, if he should appear by Attorney, for a Devastavit would lie against him,

How far an Infant must appear by Guardian.

de

de bonis propriis for his losing by Default or sham Pleading; nay in not taking that Advantage, that he might, in pleading. Besides, they said, it was a most clear Point, that where one sole Infant-Executor sues or is sued by Attorney, it is Error; and therefore there could be no Reason for its being otherwise in this Case. And as to the Case of Foxwith and Tremayne, the Chief Justice and Justice Reynolds intimated their Doubts of its being Law; for they said, that the Reason, that the Judges, who gave that Resolution, went upon, was clearly not Law; which was, that the Infant could not be prejudiced; and that which weakens the Authority too of that Case is, that there are only two Judges against one. The Case tho', which they said they relied upon, is a Case in Style 318. which is in Point. Accordingly the Court reversed the Judgment of the Common Pleas; declaring that one of the Executors ought to have appeared by Guardian, the other by Attorney; and so sever'd in Plea; as there are Cases in the Books, in which that has been done; and to have had distinct Judgments against them.

De la Costa and The Russian Company.

How far a Rule shall be granted in order that a Return may be made to a Mandamus.

THIS was a Mandamus, that went to the Russian Company, to make the Plaintiff free of it. And a Motion was now made, that there might be a Rule upon the Company to make a Return to the Writ. But Mr. Lee, who was of Counsel for the Company, objected, that before the Statute of 9 Ann. 20. no such Rule was usually made in any of the Cases of Mandamus till an Alias and Pluries were first gone; (tho' indeed he did admit, that the Court had it in their Power to make such Rule sooner;) but that Statute has taken it out of the Power of the Court to exercise this Indulgence in respect of annual Officers of Corporations, by compelling a Return to the first Writ of Mandamus; but he said, that the Case in Question and all other like Cases were left as they were at Common Law. And therefore as there was nothing particular in this Case, he hoped the Court would go according to their usual Way. But the Court said, that it was very true, that this was the usual Course before that Statute, and that that Statute did not extend to Cases of this Nature. But they said, that this Practice had been much complained of before the Act; and therefore as the Statute had pointed out to them a Direction in the one Case; the Court had always thought that they could not take a better Course than by following that in the other. Accordingly they said, that this had been the constant Course to make Rules for Returns to the first Mandamus in all Cases since the Statute: Upon which they granted it now. The Chief Justice absent.

The King and Scott.

THIS was an Information in the Nature of a Quo Warranto, that was mov'd for against the Defendant upon 9 Ann. cap. 20. sect. 8. for continuing in the Office of Mayor above his Year, and preventing the Election of a new Mayor. The Counsel for the Defendant objected, that this Town, which the Defendant was Mayor of, was a Town and County, and that the

the Sheriff was returning Officer; and that this Act only extended to such Mayors, or other Head-Officers, that preside at Elections, and make Returns of Members to serve in Parliament. The Court all deliver'd their present Thoughts to be, that the Act extended only to such Mayors; but yet as it might bear a Dispute, they said, they would not determine this Matter upon Motion; but granted the Information, in order that it might come before the Court in another Manner. And this, the Chief Justice said, was the usual Method of the Court to do; for if they should refuse Informations in these Cases, the Party would be absolutely without any Remedy; but if they do grant them, and afterwards adjudge that they rightfully go when they do not, the Party has his Remedy in a Superior Jurisdiction; so that in the one Case there is less Inconvenience, than in the other. And this the Court said was their Way in Motions for Prohibitions.

How far the Statute of 9 Ann. c. 20. sect. 8. does not extend to such Corporations as are Towns and Counties of themselves.

Miles and Wourldge.

THIS was a Motion to stop the Proceedings on a Scire facias against Bail, for that the Plaintiff in the original Action declar'd for a greater Sum, than was contain'd in the Ac etiam. And the Chief Justice produc'd a Rule, that was made 22 Car. 2. which says, that wherever you declare for more than is contain'd in the Ac etiam, the Bail shall not be chargeable. This was the Point that the Court went upon; and accordingly stopp'd the Proceedings. There was indeed something farther in this Case, and that was, that Judgment was given for the whole Sum contain'd in the Declaration; and this second Action demanded that whole Sum against the Bail. And the Chief Justice said, that indeed 'twas necessary, that there should be the same Sum demanded against the Bail, as was contain'd in the Judgment; for the Action against the Bail was founded upon the Judgment; and if there was a Variance in the Sums, the Bail might plead Nul tiel Record. After this the Counsel for Plaintiff offer'd to enter a Remittitur upon Record for so much as the Judgment exceeded the Ac etiam. But as the other Side would not consent to it, the Court said they could not alter their antient Rules.

When the Plaintiff declares for more than the Sum contained in the Ac etiam, how far the Bail cannot be liable.

White and Woodhouse.

THIS was a Rule to shew Cause why 8s. should not be brought into Court, and struck out of the Declaration. The Counsel said, that this was a Quantum meruit for using a Chaise ill, that a Person hir'd of another; and that the Court had never gone so far as to allow of these Motions in such Cases as these. For they said at this Rate, they might come in Time to allow of them in Battery and Trespass, &c. 'Tis true indeed, Mr. Strange said, that in general Quantum meruits for the Hire of a Chaise, &c. the Court does grant 'em. The Court agreed to this Difference. And the Chief Justice said, that this Rule was first made in my Lord Chief Justice Kelynge's Time. And the Reason of it he said was, for the Difficulty of

Where Money shall not be allow'd to be brought into Court.

Pleading a Tender. Accordingly they discharg'd the Rule in this Case.

Ivory and Machen.

How far the Bail shall be allow'd to surrender the Principal before the Return of the two Scire facias.

A Motion was made to stop the Proceedings on a Scire facias against the Bail. The Reason, which the Counsel gave, was because the Defendant in the original Action died between the Teste and the Return of the Scire facias; so that the Bail is depriv'd of the Benefit of surrendering him in Discharge of themselves, which they are intitled to by the Rules of the Court. And they cited the Case of Endrop and Hurten, Hill. 1723. where they said, this very Thing was done. But the Court said, that the Allowing of the Bail to surrender the Party in Discharge of themselves, after the taking out of the Scire facias was but a meer Indulgence: And that the Bail ought to have taken Care to have deliver'd up the Party before the Scire facias taken out against them. And this very Point the Chief Justice and Just. Reynolds said, they remembred very well was determin'd in the Case of Parry and Berry. And the Chief Justice produc'd a Note of this Case, Mic. 1726. And he said, that Hill. 1723. was the first Term he sat in Court; and that he remembred no such Case as was mentioned by the Counsel.

Anonymus.

When a Mandamus is mov'd for, how far the Court will not make a Rule for inspecting the Books of the Corporation till a Return is made to the Writ.

A Person obtains a Mandamus, and some Time after, but before the Return, he applies to the Court for a Rule to inspect the Books of the Corporation. But the Court refus'd to grant it. They said indeed, where a Rule is made to shew Cause for an Information in the Nature of a Quo Warranto, they do grant this Motion; because there the Court almost determines the Right of the Information upon the Motion; and therefore there they see, that it may be requisite to have the Inspection of the Publick Books immediately. But here they said, they could not see whether you would have any Occasion for them till the Return; for perhaps the Corporation will do what the Mandamus requires of them. Salk. 430.

The King and Tucker.

When an Election of Burgesses is to be made in a Corporation, how far Notice must be given previous to such Election.

ON a Rule to shew Cause why an Information in the Nature of a Quo Warranto should not go against the Defendant for exercising the Offices of Capital Burgess and Mayor of Lyme Regis. The Objection against him as Capital Burgess was, for there being no Notice given to some of the Burgesses at the Time he was chose. His Counsel tho' said, 1st, That all the Burgesses were present at the Time he was chose; and therefore tho' there had been no Notice, 'twould not have signified. And to this Purpose they cited Strangeways's Case, Hill. the first of the late King; where they said this Point was determined. 2^{dly}, They said that there was Notice given. As to the first Point that the Counsel laid down, the Court said, that the Reason that the Court went upon in Strangeways's Case was, that

that the Burgesſes went all voluntarily to an Election. But in our Caſe ſome of the Burgeſſes oppos'd the going on to an Election; and therefore Notice is material. To the ſecond Point, they ſaid, that there was not a legal Notice; for to a legal Notice for the filling up of a Body, 'tis neceſſary, that the Deſign of the Meeting ſhould be contain'd in the Notice. The Chief Juſtice ſeem'd to admit, that if they go on to ſeveral Buſineſſes, they all need not be put into the Notice, but the principal Buſineſs and Deſign of their Meeting muſt. And the Chief Juſtice ſeem'd to take a Difference between Notices for Aſſes of that Conſequence, as filling up the Body, &c. and Notices for inferior Aſſes of the Corporation; for in theſe he ſeem'd to think it was not neceſſary, that the Deſign of the Meeting ſhould be contain'd in the Notice. And ſo did the Attorney General intimate in his Argument. And therefore for as much as in the Caſe at Bar there was only a general Notice, and it was not contain'd in the Notice for what Purpoſe the Meeting was to be; the Court ſaid it was irregular; and therefore made the Rule abſolute for the Quo Warranto's going as to the Office of Capital Burgeſs. The Objection againſt him as Mayor was, that his being a capital Burgeſs was a Quality eſſential to his being Mayor, and therefore as he was not a capital Burgeſs firſt, he could not have a Right to be Mayor. To this his Counsel answer'd, that his being a Burgeſs was as much as was requir'd by the Charter; for the very Words of it are, that the Mayor ſhall be choſe de Burgenſibus Burgi prædicti; and that he was a Burgeſs was admitted on all Hands. Upon which the Counsel for the King ſaid, that the Word Burgenſis & Capital' Burgenſis was uſed promiſcuouſly one for the other in the Charter; and in the next immediate Clause 'twas expreſſy provided, that if the Mayor be removed or dies in the Office, the new one ſhall be choſe de Capital' Burgenſibus; and they ſaid there could be no Reaſon for providing that the Mayor ſhould be choſe out of a different Set of People in the one Caſe, from what he ſhould be in the other. They ſaid too, they had produced Affidavits of ſeveral Perſons, that had been well acquainted with the Borough, to ſhew that the Mayor has been conſtantly choſe out of the Capital Burgeſſes; and the other Side had produced no Inſtances to the contrary. Accordingly the Court ſaid, that this Uſage would be good Evidence of a By-Law for conſining the Number of thoſe out whom the Mayor is to be elected, tho' there are no Memorials now in Being of ſuch By-Law. And ſuch a By-Law the Court ſaid would be good, tho' there had been no Words in the Charter to render the Word Burgenſis dubious and uncertain. And the Attorney General ſaid, this was like the Caſe of Corporations, which is in 4 Co. 77. And he took a Difference between a By-Law's being able to confine the Number of Eleſtors, or Perſons mention'd in a Charter, out of whom a Mayor ſhall be elected; but not being able to amplify or increaſe the Number; as was the Caſe the other Day that came before the Court, of the King and the Town of Brecknall where the Charter requir'd, that the Mayor ſhould be choſe de Burgenſibus inhabitantibus; in that Caſe indeed the Court held, that no By-Law could make it ſufficient for the Mayor to be choſe de Burgenſibus non inhabitantibus.

When a Notice is given to the Members of a Corporation, how far the Intention of the Meeting muſt be inſerted in the Notice.

How far the Word Burgeſs ſometimes ſignifies the ſame as Capital Burgeſs.

How far a Uſage in a Corporation ſhall be Evidence of a By-Law.

What ſhall be ſaid to be a good By-Law.

tibus. Accordingly the Court made the Rule absolute as to the Information's going against the Defendant too for his exercising the Office of Mayor.

The King and Tucker.

How far Liberty shall not be granted to take Copies of Charters of a Corporation.

THIS was a Motion to have Leave to inspect the Charters of the Corporation of Lynn Regis. But the Court said they never grant such a Rule; for you may take Copies of them at the Rolls.

Dorvill and Aynsworth.

THIS was an Action brought upon a South-Sea Contract. And the Declaration set forth, that the Plaintiff was bound to transfer 800 l. Stock, and that the Defendant was bound to pay 5800 l. that two reciprocal Notes were given for that Purpose, and that the Plaintiff was ready to make a Tender of it at the Day; but that the Defendant was not there; upon which he now demands the Money. Two Things were moved in Arrest of Judgment. One was, that the Contract was not registered pursuant to the Statute of 7 Geo. 1. The other was, that 'twas laid in the Declaration, in Capitali Funda Societatis Mercatorum negotiantium ad Maria Australia America, Anglice, South-Sea Stock; whereas it ought to have been Maria Australia. As to the first Point, the Counsel said, that the Promissory Note of 5800 l. was only registered, and not the Note, which the Plaintiff gave for transferring; so that the full Contract was not registered. And as to what the other Side might say, that 'twas not in their Power to register more than what was in their own Hands; to this they answer'd, that they might at least have register'd a Memorial or Abstract of the Whole; and the Act gives them a Power to register the Contract itself or a Memorial of it, at their Election. Now that the whole Contract was not registered by registering this Note only, they said was plain; for the Words of the Note are; I Promise to accept of 800 l. South-Sea Stock, and to pay 5800 l. for the same; by which, the Counsel said, there was nothing registered that imported any Contract on the Part of the Plaintiff, and therefore the Whole was not registered. That the Words (for the same) did not import a reciprocal Covenant, they said, was plain; for if it did, then in an Action brought upon such Note, you need not aver the Tendering of the Stock, which 'tis evident in this Case you must. Upon this they took a Difference between Instruments containing reciprocal Covenants, and Instruments containing only a Covenant of one of the Parties. And this Difference is well warranted in 7 Rep. 10. The first Part of it they said was laid down in the Case of Pordridge and Cole. The second Part of it by the Case of Peters and Opey, 2 Saund. But the Court gave their unanimous Opinion, that the Contract was well registered; for it appear'd by the Register, that each Party was under mutual Covenants; in as much as it appear'd, that the Party registering had accepted the Note, by which Acceptance he was necessa-

How far a Contract relating to South-Sea Stock shall be said to be well registered.

larily

fairly bound. And accordingly they said, that this very Point was ruled thus at Nisi prius in the Case of Hardey and Paterson. But as to the second Exception, the Court agreed with it; for they said, that a Corruption can only be known by its Name. And they said, it was a Rule, that where there is a proper Latin Word to express any Thing, and that Word is not used, but a Word insensible, in such Case an Anglice cannot help it. However the Counsel for the Plaintiff mentioned the Case of Smith and Walner, Raym. 15. which was an Action of Trover for a Frying-Pan; and there it was said Satagena instead of Sartagena. But Judge Reynolds said, that the Utensils among the Romans were not the same as amongst us, and therefore the Court would allow greater Latitude, and let you coin Words in such Cases. The Counsel for the Plaintiff though cited one more Case, and that was in 10 Rep. 133. where Vitrium, Anglice a Glass, was held good, though there is a proper Word, which is Vitrum. But the Court said the Judgment, where that Case is cited, proves nothing against this, for there was a Replevin brought for the taking of several Pieces of Goods, one of which was a Glass; and in that Case general Damages were given; which does not at all imply that Vitrium is good; for tho' it be a Word insensible, and of Consequence the Jury could not take that into their Consideration, yet general Damages are well given; for the Law supposes that the Jury did not increase their Damages upon that Score. However the Court said, they would take a farther Day to consider whether this second Exception could be got over.

How far a Jury shall not be understood to have given Damages for any particular Things laid in the Declaration by Reason that they are described by improper Words.

The King and Curl.

THIS was an Information exhibited against the Defendant for publishing two obscene Books; the one titl'd, The Nun in her Smock; the other, The Art of Flogging. And now it was moved in Arrest of Judgment, that this was not an Offence within the Cognizance of the Common Law. But after solemn Deliberation, the Court held it to be an Offence properly within its Jurisdiction; for they said, that Religion was Part of the Common Law; and therefore whatever is an Offence against that, is evidently an Offence against the Common Law. Now Morality is the Fundamental Part of Religion, and therefore whatever strikes against that, must for the same Reason be an Offence against the Common Law. The Case of The King and Taylor, 1 Vent. is to this very Point.

How far the Speaking against Religion is an Offence against the Common Law.

Holyday and Fletcher.

THIS was a Special Demurrer to a Declaration in an Action against a Woman as Administratrix. And the Cause, that was shewn, was, for that it is not said in the Declaration cui Administratio commissa fuit. And to prove that this was necessary, the Case of Wade and Atkinson, 2 Cro. was cited. Likewise an Opinion to this Purpose, in 1 Syd. 228. And a Case in 2 Vent. 84. where this was directly adjudg'd.

When a Defendant has an Action brought against him as Administrator, how far such Declaration shall be said to be good.

But the Court said, That the Declaration charging the Defendant as Administratrix is the very same in Common Sense, as if it had said, *cui Administratio, &c.* They said too, that one Part of the Case in 2 Cro. had been over-ruled several Times; and therefore this Part of it was of less Authority. It is true, they said, there was such an Opinion in Syd. And as to the Case in Ven. the Counsel gave an Answer to that; for they said, that that was a Case in the Common Pleas, and there the Declaration is, that the Plaintiff queritur, quod, &c. such a one died Intestate, and in such Case therefore you must aver, that Administration was committed to the Defendant to entitle you to your Adson; but in our Case it is queritur de the Defendant Administratrix; and that is certainly good. Accordingly the Court gave Judgment for the Plaintiff.

The King and Lyster.

What shall be said to be such a Trade as that the Exercise of it shall be an Offence within the Statute of 5 Eliz. for want of the Party's serving an Apprenticeship to it.

TWO Exceptions were taken to an Indictment for Exercising the Trade of a Salter, contrary to the Statute of Eliz. the Defendant not having served an Apprenticeship seven Years. The first Exception was, that this Mystery was not within the Number of those mentioned in the Act, and consequently not punishable by that Statute. But it was answered, that this Act had provided a very proper Remedy for the Advancement of Trade; and therefore was not to be confined barely to those Mysteries mentioned in the Act; but where there are like Trades, that require Knowledge and Experience, they are within the Intention of it, and the Mysteries mentioned in the Act are only set down for Examples. Accordingly the Court over-ruled this Exception. The other Exception was to its being said in the Indictment that the Trade was *infra hoc Regnum usitae* at the Time of the Act made. Now they said, *hoc Regnum* would as well extend to Scotland as England; and the averring that this Trade was used in Scotland at the Time of the Act would signify nothing. Upon this Exception the Court quash'd the Indictment.

The King and Sir Edmund Elwell.

What shall be said to be a good Conviction for a Forcible Detainer before a Justice of Peace, notwithstanding an Exception that the Continuance of the Estate is not rightly set forth.

THIS was a Conviction upon the Statute of 8 H. 6. 9. for a Forcible Detainer. And one Exception to it was, that it was indeed said in the Conviction, that at the Time the Entry was made into the House, the Party had an Estate for Life in it, but it is not said that that Estate continued at the Time of the Detainer complain'd of; it was indeed said *adhuc ab ea detinet*; but said the Counsel, the Party might have surrendered her Estate between the Entry and the Detainer with Force, and taken an Estate at Will; so that it may be truly said *adhuc ab ea detinet*, and yet not an Offence within that Act; and it does not appear but the Entry was very lawful. To this it was answered by the Court, that when a Person is out of Possession, he cannot surrender, and therefore the Estate must necessarily continue. Another Exception was taken to it, that it appears that

that the Conviction was made five Days before the Certiorari went down to the Justices; and yet there is no Fine in the Conviction; the Counsel said, that a Fine must be set immediately upon the Conviction; or at least within a moderate and convenient Time for the Justices to think of it; but they said, that by the same Reason that they might stay five Days, they might stay five Months; and by this Means the Offender would be deprived of the Benefit of discharging himself from Imprisonment, which the Statute gives him by paying his Ransom. The Court seem'd to think this an Exception, which deserved some Consideration, and accordingly they order'd it to stand over.

How far Justices of Peace must set the Fine at the Time of the Conviction.

Anonymus.

THE Court refused to let a Man justify Bail without Notice, though it was the same Bail as was taken by the Sheriff upon the Attachment. They said indeed where the Plaintiff takes an Assignment of the Bail-Bond, there is no Occasion for Notice in justifying, because the Plaintiff has before accepted the Bail.

How far Notice is necessary to be given concerning the putting in of Bail.

The King and Hayes.

THIS was an Information for forging a Bond. The Defendant was found guilty; and now the Counsel for the King applied to the Court for Leave to make an Amendment in the Nisi Prius Roll, there being a false Spelling of a Letter in one of the Words, and to set it right by the Plea-Roll. In Civil Cases the Counsel for the King said, there was nothing more common, than to amend after a Verdict, where there was something to amend by. And this they said had been done sometimes in Criminal Cases. To this Purpose they cited a Case quoted in the Case of Adington and Derby, 2 Bulst. 35. where two were indicted for Felony; but the Indictment ran in the Singular Number; this was moved in Arrest of Judgment; upon which this Matter was referred to the twelve Judges; and it was order'd to be amended; and they were both accordingly executed. The Chief Justice said, If this had been before a Verdict, no Doubt they would have amended it. And he said as this Case was, he thought they should certainly allow it; for the Nisi Prius Roll is the Defendant's own making up, and therefore he should certainly not take Advantage of his own Fault. But however it stood over.

How far Indictments may be amended after a Verdict.

The King and Street.

AN Exception was taken to an Order of Bastardy, for that the reputed Father is order'd to pay two Shillings weekly for the Support of the Child, till he shall come to the Age of nine Years, if he shall live so long. And it is not said, if he shall so long become chargeable. Now the Counsel said, he may have an Estate left him before he comes to be nine Years old; and then he will not want the two Shillings;

What shall be a good Order of Bastardy.

so

so that the Order is too general. But the Court said, that the very late Cases have all allowed these Orders to be good; for there is not a reasonable Intendment that he will be able to provide for himself sooner. Though indeed the Chief Justice did admit that even the Cases so late as *Salkeld* went otherwise.

Term. Hill.

I Geo. II. 1727:

The King *and* Hayes.

Vide p. 31.

How far the Evidence given upon an Indictment shall be said to support the Issue.

THIS Matter now came on again, and the Fact appeared to be in the Manner following; this was an Indictment for forging a Bond. And there was a Variance between the Record in which the Issue was joined, and the *Nisi Prius* Roll; in that the Issue on the Record was, whether the Defendant did not forge a Bond, wherein such a one in paroch' of such a Place stood bound to him in such a Sum. And the Bond produced in Evidence was peroch'. Upon this a Special Verdict was found, and the Doubt that the Jury left to the Court was, Whether the Bond given in Evidence maintain'd the Issue; if so, they find the Defendant guilty. And now the Court was moved to amend the *Nisi Prius* Roll, and make it agreeable to the Record. But the Counsel of the other Side objected, that the Bond given in Evidence did not maintain the Issue; for it was between different Parties. And the Issue, which the Justices at *Nisi Prius* and the Jury there had before them, was that contained in the *Nisi Prius* Roll, and the Evidence does not maintain that Issue. But the Court said, that the Issue which the Justices at *Nisi Prius* and the Jury there have to try, is not that contained in the *Nisi Prius* Roll, but that contained in the Record, which the *Nisi Prius* Roll is only a Copy of; and the Bond given in Evidence very well supports that Issue. They said too, that the Defendant himself makes up the *Nisi Prius* Roll, and to be sure he should not take Advantage of a Variance he himself had made. Judge Reynolds said besides, that he did not think this a material Variance; and therefore the Court

Court was bound to give Judgment for the King, tho' the Counsel for the King had not moved to make the Amendment. The Chief Justice however said, that it was proper in all such Cases, where there is but the least Colour of a Variance, that signifies any Thing, to direct the Jury to find the Matter specially; for in criminal Cases there is no other Way of taking Advantage of it; as in Civil Cases there is; for there the Justices of Assize direct the Jury to give a general Verdict, and then that Point is reserved to be argued afterwards.

How far in criminal Cases 'tis proper that a Special Verdict should be given.

Hill and Martin.

MR. Strange mov'd to set aside a Writ of Inquiry for two Irregularities; the first was, for that the Notice for executing it was at such a Day at eleven o'Clock; and it was executed at half an Hour after Eleven, tho' the Defendant was not there; whereas by the Rules of the Court it ought not to have been executed till an Hour after the Notice, if both Parties are not there ready. The other Irregularity was, that the Plaintiff gave no Evidence to the Jury, and yet they have given him Damages, which he said was always a Cause for setting them aside. Accordingly the Court did set it aside.

How far a Writ of Inquiry shall be set aside.

Anonymus.

A Motion was made to set aside a Procedendo, and that the Defendant might be at Liberty to give Bail to the Habeas Corpus, which had removed the Cause out of an inferior Court. The Reason that was given for this Motion was, that the Defendant had a Design to have given Bail to the Habeas Corpus according to the Course of the Court; but that the Plaintiff himself propos'd Terms of Accommodation, and while they were under a Reference the Time for putting in Bail slipped, and upon this the Plaintiff took his Advantage to snap the Procedendo. But the Counsel of the other Side said, that by the Rules of the Court the Defendant is obliged to put in Bail to Habeas Corpus of this Nature within six Days after the Plaintiff has given him Notice; and that the Plaintiff accordingly did give such Notice, and the six Days laps'd before Terms of Accommodation were ever offer'd. Upon which the Court said, that the Procedendo is very regular.

When a Cause is removed up by Habeas Corpus, how far a Procedendo shall be said to be regular.

Anonymus.

A Motion was made to set aside a Plea to a Scire facias to assign Errors. The Plea was, that there is a Discontinuance between the first and the second Scire facias; the first bearing Teste the first Day in Michaelmas-Term last, returnable at a Day within that Term; the second bearing Teste the first Day of this Term, returnable at a Day within this Term. But this, 'twas said, was a mere frivolous Plea; for the second might have been taken out at any Time. And Mr. Strange, who was of Counsel for the Motion, said, that 'tis not a long Time, that these Pleas to Scire facias's to assign Errors have been allow'd at all; for they used to assign Errors upon them immediately.

How far a Plea to a Scire facias to assign Errors shall be set aside.

diately. Accordingly Mr. Justice Page (who deliver'd the Opinion of the Court, the Chief Justice being absent) said, that in Scire facias's concerning a Matter of Right, indeed the second Scire facias must bear Cesse the Day of the Return of the First; but the second Scire facias to assign Errors may be taken out at any Time after the First; for Scire facias's to assign Errors are only to hasten the Plaintiff in Error to assign his Errors, which it appears by his bringing the Writ of Error he ought to have done. And so the Plea was set aside. The like was done afterwards in this Term in the Case of Owen and Wright.

Braington and Eyre.

How far a Person shall not be allow'd to take an Assignment of the Bail-Bond, by Reason that the same Persons are Bail above, who were Bail to the Sheriff.

A Motion was made to stay the Proceedings upon a Bail-Bond. The Reason that Mr. Blincoe gave for it was, that the same Bail was given before a Judge, as was taken by the Sheriff, and notwithstanding this the Plaintiff has got an Assignment of the Bail-Bond, and is now proceeding upon it; and he said it was contrary to the Practice of the Court to allow an Assignment in such Cases. Mr. Justice Page (who deliver'd the Opinion of the Court, the Chief Justice being absent) said, that he had inquired of the Master, and he found the Practice was so. And therefore the Proceedings were stay'd.

The King and Dr. Whaley.

THIS was a Writ of Error upon a Judgment in a Quare Impedit given in the King's Bench in Ireland. And the King declar'd, that Dr. Vigars was late Parson of the Church in Question, and that King William and Queen Mary promoted him to the Bishoprick of Lile and Ferns, that by this Means the Crown had a Right to present the next Turn, that King William and Queen Mary did not present, that after their Death the Turn came to Queen Anne, that she did not present, and that from thence it came to R. George I. that he never presented, per quod Ecclesia prædicta adhuc vacans existit promotione prædicti Vigars; and so that King brought his Quare impedit. To this the Archbishop pleads, that true it is such Right of Presenting was in the Crown in the Manner as is aforesaid; but says, that this Rectory of Armagh now in Question, &c. has been Time out of Mind Part of the Possessions of the Archbishoprick of Armagh; that King William and Queen Mary collated Dr. Drelincourt to this Leany of Armagh, cum omnibus Membris, Juribus & Pertinentiis, that by Virtue of these Letters Patent the late Archbishop of Armagh, Predecessor to this present Archbishop, admitted, instituted and inducted the said Dr. Drelincourt to this Rectory of Armagh now in Question; by Means of which the Crown had taken Advantage of its Turn, and that Dr. Drelincourt was dead. Dr. Whaley pleads, that true it is that such Right of Presentation was in the Crown; but says that R. William and Q. Mary presented Dr. Drelincourt to this Rectory by Letters Patent; prætextu quarum quidem Literarum Patentium he was instituted and inducted, and died in Possession of it; that Dr. Vigars the Promotee is dead; absque hoc, quod Ecclesia prædicta adhuc vacans existit promotione prædicti Vigars. The Attorney General

General demurs to the Plea of the Archbishop; and to the Plea of Dr. Whaley replies, that King William and Queen Mary did not present Dr. Drelincourt to this Rectory; & hoc petit quod inquiratur per patriam. Upon this Dr. Whaley demurs. The Court below had given Judgment against the King. Now this Court said, that the Plea of the Archbishop could not be maintain'd; for by collating Dr. Drelincourt to the Deanery of Armagh, cum omnibus Membris, &c. the King only intended to give him the Deanery and the Right of presenting to the Rectory, as incident to it, without the least Design of making him Rector. Another Point tho', which was in Question here, was, whether the very Admission, Institution, and Induction, without any Presentation, did not make a Plenarty in this Case, and by this Means the next Turn taken, and consequently the King's Right to have the next Turn lost; but the Court said, that true it was, that such Admission, &c. without a Presentation, would make the Church so far full, that the Incumbent would have a Right to demand the Profits of the Church against all that ought to pay them, &c. so that in these Respects the Church is by this Means full; and the Reason is, that such Persons are at no Inconvenience; for once they ought to pay them, and but once they shall pay them; therefore it shall not lie in their Power to controvert whether the Incumbent is in by Right or not; but in as much as he is in by the Acts of the Bishop, him they shall be accountable to. But such Admission, &c. shall not take away the Right of Presenting that is in another hac vice; for there is in this Case no publick Act, which the lawful Patron is bound to take Notice of to prevent his being dispossessed of his Right of Presenting; and therefore such Incumbent is clearly removeable at any Time, and the Church consider'd as to him absolutely void. Dr. Whaley's Demurrer came to be considered; and the Reason for it was, that the King in the Replication did not tender him an Issue on the absque hoc, &c. and this 'twas said was a material Point to be travers'd; for 'tis not only necessary for the King to shew how such Title once was in the Crown; but to support his Quare impedit he ought to shew, that such Title is in the Crown now; and to this Purpose the King did right to continue down to himself a Title in his Declaration; and he ought to have pursued the same Way in his Replication, by not only joining Issue upon the Turn's being taken by the presenting Dr. Drelincourt, but by offering an Issue upon the Absque hoc, &c. to shew that the Title is in him now. But the Court said, that when the King had set forth a Title to himself, the other Part of the Declaration to shew the Continuance of his Title was Surplusage; for the Law supposes it to continue till something appears to the contrary; and therefore the Traverse was immaterial; and consequently no Issue need be offer'd upon it. Another Point, that was mentioned to shew the King had no Title now, was, that the Promotee was dead, and therefore 'twas too late for the King now to take it; for the very Foundation of this Right is the changing one Life for another, by which the Patron would be at no Inconvenience; and this was said to be the Foundation of it in the great Case of Lancaster and Birch, on a Writ of Error brought into the House of Lords upon a Judgment in the

The Construction of a Collation made by the King.

What shall not be said to make the Church to be full.

How far a Traverse need not be taken by the King.

Within what Time the King must take Advantage of a Right to promote.

the King's Bench, where this Prerogative of the King's having any such Title to present at all was disputed. However as it was nothing but Changing one Life for another, the House of Lords did affirm the Judgment of the King's Bench. But the Counsel said, that if the King was not confined to take his Turn in the Life of the Promotee, there would be the most manifest Injury to the Patron, for no one Fault, unless that was one, to present him to a Living, who was afterwards thought worthy to be a Bishop. For they said according to this Way of thinking, the King would have it in his Power to keep the Church vacant for ever; unless some Body would present and get his Clerk inducted; and then the King would punish him as a Usurper, and remove his Clerk by Quare impedit. 6 Rep. 30. But the Court said, that they could not enter into the Reason of this Prerogative; that they were only to consider, that by the Law the King has a prerogative Right in this Case vested in him, and the Consequence of it was, that the King was not confin'd to take it within the Life of the Promotee, for Nullum tempus occurrit Regi. This they resembled to the Case of Simony, which the Statute of 31 Eliz. cap. 6. has provided, that whoever is guilty of it, the King shall have a Right to present for that Turn. Now it appears by the Preamble of the Statute of 1 Will. & Mar. cap. 16. that the King was not bound to take that Turn in the Life of the Simoniack, but had a Power of presenting after such Patron had again presented, and turning such Incumbent out. And this Inconvenience the Statute relieves. By which it is evident, that the King need not in the present Case take his Turn in the Life of the Promotee. However the Court gave no Opinion in this Matter at present, but it was put off to the Beginning of next Term.

Thresher and Chapman.

How far a
Person may
avow as Bai-
liff to a
Husband and
Wife.

THIS was a Writ of Error upon a Judgment in the Common Pleas. 'Twas in an Action of Trespass; the Defendant avow'd for Damage-feasant, as Bailiff to Lord and Lady Walpole, for a Trespass committed upon the Freehold of my Lady, which my Lord was seiz'd of in her Right. The Plaintiff replies, that he had a Common pur cause de vicinage, and so the Beasts strayed into the Freehold. The Defendant traverses this Justification. Upon which they went down to Trial; and the Plaintiff was nonsuited. So Judgment went against him. One of the Errors assign'd was, that the Plea of the Defendant was ill, upon account of his Avowing as to my Lord and Lady, whereas he ought to have avow'd only as Bailiff to my Lord; and consequently Judgment ought not to be given against the Plaintiff for any subsequent Default of his. But the Court said, that the Plaintiff could not take Advantage of any Errors in the Defendant's Plea, inasmuch as he was out of Court by the Nonsuit. Besides, they said, this was no Error; because it is certain a Husband may make a Bailiff for himself and his Wife; notwithstanding a Case in Fitzh. Abr. Title Avowry 198. to the contrary. Another Error assign'd was, that the Costs are wholly assessed by the Court in this Judgment; whereas Costs are always given first by the Jury, and then the Court adds

adds to them by Way of Incrementum. But it was answer'd by the Counsel of the other Side, that when a Man is nonsuited, the Jury do not appear; and consequently they cannot give any Part of the Costs. Accordingly the Court affirm'd the Judgment.

The King and Franklyn.

THIS was an Information for a Libel. And it was now moved for a new Trial. The Reason given for it was, that the Verdict was ill; inasmuch as it appears, that the Jury was not return'd by the proper Officer. And to shew this, they said, that the Distringas was returned by John Grovenor Mil' and Thomas Lome Mic', whereas there was no such Sheriff of London as Thomas Lome Mic', but Tho. Lome Mil'; and this was verified by Affidavit. The Court said, unless something farther appears, this is a good Exception; for they must take it upon what lays before them. that Tho. Lome Mic' is a different Person from Tho. Lome Mil'; and if it was a different Person that made the Return, from the Person that was Sheriff, 'twould certainly be ill; and there's no other Way to take Advantage of it but this, by moving for a new Trial, and making Affidavit that such a one was Sheriff at the Time of the Return, who appears to bear a different Name from him, whose Name is annex'd to the Return. Upon which the Attorney General said, that the Sheriff's adding his Title of Knighthood at all to his Signing the Return is Surplusage; and therefore his doing it in an improper Manner shall not make ill what was good before. He admitted indeed, that this Addition was necessary in Declarations, Deeds, &c. for it is Part of the Description of the Person, as it was determin'd in the Case of the Bishop of Chester; but when a Man subscribes his Name, those Additions are always omitted. But the Chief Justice said, that there's no such Thing as Surplusage in the Names of Persons; and therefore unless something else appears, they must intend that a different Person made the Return than ought to have done it. Then the Attorney General desired Time of the Court, that he might be able to verify, that Tho. Lome Mil' did actually make the Return; and prayed that a Rule might be made, upon Tho. Lome Mil' one of the Sheriffs of London to attend and inform the Court, whether he did not make this Return, and that upon his so informing the Court the Return might be amended. This proceeding, the Attorney said, was warranted by 9 Rep. 31. The Court said, that this was a new Point; and therefore order'd it to be spoke to again next Term.

How far the Court will give Leave, that a Return to a Writ may be amended.

Pamsford and Fen.

THIS was an Action of Debt upon a Bond. And the Cause of Action was laid to arise in Gloucestershire, but the Venue was laid in London. Upon this the Defendant demurred generally. And the Court said, that it was their Opinion, that this Error might be taken Advantage of upon a general Demurrer. But as the Counsel desir'd to look into it, it was order'd to stand over.

How far a wrong Venue may be taken Advantage of upon a general Demurrer.

The King and Blackgrave.

How far the
King's Bench
may exercise
a Jurisdiction
over the
Writ of Ex-
communicato
Capiendo
before the
Return of it.

THIS was a Motion for an Attachment against the Defendant for a Rescous. Mr. Reeves was Counsel against the Motion, and he said, it was true indeed the Defendant was taken up upon an Excommunicato capiendo, and that he did rescous himself; but he said, till the Writ is returned into this Court, there is nothing of the Cause in Court, and therefore the Court cannot grant an Attachment for a Contempt done before the Return of it; and consequently the Attachment ought not to go. But Judge Reynolds said, that the Writ is supposed to be inrolled in this Court before the Return, and therefore the Court may grant an Attachment for a Contempt done before the Return. And he said he remembered a Case where it was determined, that a Writ of Excommunicato capiendo might be superseded before the Return. Upon which the Court granted the Attachment.

The King and Sir Edmund Elwell.

THIS Matter now came on again; this was a Conviction for a Forcible Detainer. And two Exceptions were taken to it last Term. The first was, that it is only recited in the Conviction, whereas such a one was seised of these Lands for Life at the Time of the Force, and it is not said that he was seised of them for Life all the Time of the Detainer, and he might have surrendered that Estate and taken one only at Will, in which Case he ought not to have been convicted of a Forcible Detainer for that Time which he had taken the Estate at Will; so that it does not appear, but the Justices have convicted him of a greater Offence than he was guilty of. The other Exception was, that it appears upon the Conviction, that they have committed him till he should pay a Fine, which they would set upon him; now according to this rate they might never set the Fine, and so he may lie in Gaol all his Life-time. As to the first Exception the Chief Justice said, it was a remote Intendment; that he should change her Estate so as is supposed; and he could easily get over that. But the second Exception, he said, deserved more Consideration. Yet there were two Reasons that made the Court something doubtful whether they could not get over it. One was, what Judge Reynolds said, that he believed it was the common Way to commit a Man first, and afterwards to set the Fine, by which he should redeem the Commitment. The other was, what the Chief Justice mentioned, that he did not know whether this Court could not set the Fine. Upon which this Matter was then put off. And now it came on again, and the Court said, they were of Opinion the Conviction ought to be quashed. For this Court cannot set the Fine, as it was determined in the Case of The King and Layton, which is reported by Keble; so that it might be a Commitment for Life. Accordingly they quashed it, unless Cause to Morrow.

Anonymus.

A Motion was made to put off a Trial, upon an Affidavit, that one of the Defendant's Witnesses was gone to New-York, and the other was lately become a Bankrupt and absconded. But the Counsel of the other Side objected, that the Defendant ought to have sworn, when he believed his first Witness would be back; and when he believed his second Witness would appear; for at this Rate, he said, a Trial might be put off for ever. But the Chief Justice said, as this was the first Time, that the Defendant had moved to put it off, he did not see, but such an Affidavit would do. And Judge Reynolds said in some Cases it was impossible to swear when he believes his Witness will be back, as was in a Case the other Day, when a Trial was put off upon account of one of the Defendant's Witnesses being gone with Sir Charles Wager's Fleet; in which Case he said it was impossible to swear when a Man believes he would be back, unless you could know what the Orders from the Government were. But however for some other Defect in the Affidavit, the Court did not grant the Motion in this Case.

What shall
be a good
Affidavit for
putting off
a Trial.

The King and Sir Edmund Elwell.

THIS was a Matter, that was mentioned before in Page 38. and the Court was unanimously of Opinion, that the Conviction was ill, for its committing the Defendant to Prison quousque finem fecerit; for they said, that this Court could not set the Fine; and the Chief Justice said, he remembered the Court was of this Opinion in the Case of The King and Layton, which is reported in Keble; for he was of Counsel in it. They said too, that they could have no proper Measure to set a Fine by in such Cases, but the Justices have, for they can do it upon View. And till the Fine was set, they said, the Conviction was not complete; and Judge Reynolds was of Opinion, that if a Certiorari should come down to the Justices before they had set their Fine, they might not, withstanding complete their Judgment by setting the Fine. They all delivered their Opinions too, that the Justices were not obliged instantly to set the Fine upon the Conviction, but they might take a little reasonable Time to consider of it. But they said, that the Commitment was wrong, for the Fine not being set at the Time the Justices did commit; and therefore the Conviction was quash'd. The Case of The King and Layton, 2 Keb. 670. was cited, where such a Conviction was quashed for this very Exception.

How far Ju-
stices of
Peace must
set their Fine
at the Time
of the Com-
mitment.

The King and Budgel.

THIS was an Information for a Battery. The Defendant moved to have Leave to inspect the Centre. The Chief Justice said, that he took it, indeed in Indiaments for Treasons, Felonies, &c. that the Defendant had no Right to inspect

How far the
Party has a
Right to
have the In-
spection of
Process with-
out Leave of
the Court.

spea it but upon Leave of the Court ; but in Misdemeanors
he had.

The King and The Dean and Chapter of Rochester.

How far a
Mandamus
will lie to a
Dean and
Chapter to
admit a Pro-
bend.

A Motion was made for a Mandamus to be directed to Dr. Clager, Dean of Rochester, requiring the Dean and Chapter to install the present Provost of Oriel College in Oxford into a Prebend of Rochester without Institution ; in as much as this Prebend was annex'd to that Provostship by Charter from the Crown, which was confirmed by an Act of Parliament made in the late Queen's Time. And the Court made a Rule to shew Cause.

How far the
Court of
King's Bench
will give Li-
berty for the
Inspection of
the Court-
Rolls of a
Manor.

Culley and Brown.

THE Defendant was a Copyhold-Tenant, and had lost his Copy ; upon this he applied to the Court to have Leave to inspect the Rolls of the Court of the Lord of the Manor, and to take a Copy of his Admission at his own Expence. And it was granted.

The King and Scott.

How far the
Court will
direct a Trial
at Bar not-
withstanding
the Expence
which will
attend the
granting it.

THIS was an Information in the Nature of a Quo Warranto against the Defendant for exercising the Office of Mayor of Poole for two Years together. The Attorney General said, that Poole was a Town and County ; and therefore this Cause could be tried no where but in the Town, (where perhaps the Mayor would have a good deal of Interest) unless it was tried at the Bar ; and therefore he moved for a Trial at Bar next Term. The Defendant made Affidavit, that the Expence of a Trial at Bar would ruin him ; which the Court took for a sufficient Answer. Then the Attorney said, he would make the old Proposals in these Cases, to take Nisi prius Costs, in Case the Issue should go for the King, and to pay Bar-Costs in Case it should go against the King ; upon this the Court immediately granted the Motion.

Anonymus.

What shall
not be said to
be a good
Presentment.

THIS was a Motion to quash a Presentment, for not repairing one of the Streets in Westminster, upon the Statute of 2 W. & M. which impowers Justices of the Liberty of Westminster to view the said Streets, and to certify at the next Sessions after such View the ill Repair of such Streets, and so to present them. Now the Exception, that was taken to the Presentment, was, that it does not appear that the Certificate was made at the next Sessions after the View ; for the Certificate is general, whereas I have viewed such a Street I do certify it is in ill Repair. The Court said, they could intend nothing to make Justices come within their Jurisdiction, and therefore upon this Exception, amongst others, the Presentment was quashed.

The King *and* Hughes.

THIS was a Motion, that was made last Term, for a Rule to inspect the Poll-Books of the Corporation of Liverpool in Lancashire, where the Names of the Persons were set down, who were Electors of a Mayor of that Town, in order that it might be seen, who had the Majority of Votes at such Election. The Chief Justice said then he would make no particular Rule; but if the general Rule for inspecting the publick Books of the Corporation would do them any Service, they might take it; which accordingly they did. And Motion was now made for an Attachment for their not granting them the Sight of these Poll-Books pursuant to this Rule. And Affidavits were now produced on each Side in order to have the Opinion of the Court, whether they were publick Books or not. But the Chief Justice said, they need not enter into their Affidavits; for one of their Officers had shewn them three Rules; one in the Case of The King and Taylor, in 8 Queen Anne, another in the Case of The King and Sir Peter Delmé, in 12 Queen Anne, the other in the Case of The King and the City of Norwich, in 4 Geo. I. by which it appear'd the Court had granted even particular Rules in Cases of this Nature for the Inspection of Poll-Books relating to Mayors and Aldermen. So that the Court was of Opinion, that such Poll-Books were Publick Books of the Corporation, and accordingly made a Rule in this Case for the Inspection of them. Of Consequence, they said too, this falls under the general Rule for the Inspection of publick Books. But the Chief Justice said, as the Court was very far from being clear in this upon the first Motion, they would not grant the Attachment.

How far the Court will make a Rule for the Inspection of particular Books belonging to a Corporation.

The King *and* Chipping-Norton.

THIS was a malicious Prosecution against a Clergyman by Way of Indictment of Felony for taking a Bunch of Hay; and upon that Account in Mich. Term 1726. the Court granted a Certiorari to this inferior Jurisdiction of Chipping-Norton to remove the Indictment up. And now the Parson came and held up his Hand at the Bar and pleaded Not guilty; and upon that was admitted to Bail; four Persons entering into a Recognizance, each in the Sum of 50 l. for his Appearance; tho' the Chief Justice said, it was held in my Lord Chief Justice Holt's Time, that the Bail should be bound Corpus pro Corpore; but the Practice now, he said, indeed was otherwise. A Motion was made now too, that he might have a good Jury; which the Court granted; but the Chief Justice said, he could not have a Special Jury without the Consent of the Attorney General.

Ante p. 7.

How far the Court will admit a Person to be bail'd for Felony.

Anonymus.

A Motion was made to amend a Declaration by altering the Venue. But the Court said, they never heard of such a Motion; so refused it.

How far the Court will not allow a Person to amend his Declaration by altering his Venue.

Term. Paschæ

I Geo. II. 1728.

The King *and* Dr. Whaley.

Anno 34.

THIS Case now came on again; and the Court came to the following Resolutions. First, They resolv'd that the Plea of the Archbishop was clearly bad. Another Point the Court resolv'd, and that was, that the King had a general Right to the next Avoidance, not limited during the Life of the Promotee; And this the Chief Justice said appeared from its being never laid in any of these Pleadings, that the Promotee still continues alive; which, if the Life was necessary, must have been in them all, in order to set up a Title in the Crown. A third Point the Court resolv'd, that if there had been any mean Presentation, and such Presentee had died, the King's Turn would have been gone. The Fourth was, that the Admission and Institution and Death of Dr. Drelincourt could not serve for a Collation against the King; because it appears the Archbishop did it upon the Foundation of the King's Title, and not to the King's Wrong. The last Point was, that Dr. Whaley had sufficiently confess'd and avoided the King's Title in his Plea, before he came to the Absque hoc, &c. that was only a Conclusion of Law from what he had said before; and therefore the Attorney General did right in not joining Issue upon it; and consequently the Doctor's Demurrer was bad. For these Reasons the Judgment below was reversed, and Judgment by this Court pronounced for the King.

The King *and* Dr. Newton and others.

How far the Court will grant an Information against a Husband for Wrongs done to his Wife.

THIS was an Information, that was applied for upon Account of an Abuse, that was made upon a Wife by the Husband and some others in putting her into a Mad-house without any Reason. And a Rule to shew Cause was granted. It appear'd too, that upon a former Motion the Court had granted a Habeas Corpus to take her out of another of these Mad-houses, that she was put into once before.

Hisham and Rodes.

THIS was a Motion for a Superseas to discharge the Defendant out of Execution, by Reason of his not being charged within two Terms after Judgment. But it appear'd, that the Plaintiff died presently after Judgment, and that a Caveat was entered against the Executors, so that they could not revive the Judgment by Scire facias and charge the Defendant in Execution within the two Terms. And therefore the Court refused the Motion.

How far the Court will not discharge a Person out of Execution by Reason of his not being charged within two Terms.

Kichley and Coustou.

THE Court was moved to amend a Capias ad Satisfaciendum in altering the Tesse of it, it being dated out of Term. Several Precedents were shewn of the Court's amending judicial Writs, where there have been Mistakes in the Clerks. Accordingly this was amended. And the Chief Justice said, he thought there was a clear Difference between Judicial and Original Writs in this Respect.

How far the Court will give Leave, that a Writ of Execution may be amended.

Holdfast and Pedigree.

ON Rule to shew Cause, why Judgment should not be entered against the casual Ejektor, an Exception was taken to the Notice, that was annex'd to the Copy of the Declaration, for its not being sign'd by the casual Ejektor. And for this Cause it was discharged.

How far the Court will stay Proceedings in an Ejection, by Reason that the Notice, Ejektor.

which was annexed to the Copy of the Declaration, was not sign'd by the casual

Anonymus.

ASheriff had taken in Execution a Stranger's Goods; and now Motion was made, that they might be staid in the Sheriff's Hands, upon offering to try the Property. And Mr. Strange, who was of Counsel in this Case, said, that the like Motion he remembred granted about three Years ago in the Case of Sir Godfrey Kneller. But the Court said, they never knew such a Motion made before; and so refused to grant it.

How far the Court will not direct that Goods which are taken in Execution, shall be staid in the Hands of the Sheriff.

Chadwell and Bruer.

THIS was an Action of Debt upon a Bail-Bond. And the Plaintiff got Judgment and Execution of the Penalty. Now the Court was moved to make a Rule, that it may be referred to the Master to see what is due in Conscience, and that the Overplus may be return'd. The Court said, if you had come before Judgment, we could have helped you; but now you have Relief only in Equity. Another Thing was mov'd, and that was, that the Plaintiff's Attorney's Bill might be taxed; but the Court said, that a Person may move to have his

How far the Court will not direct that Proceedings upon a Bail-Bond shall be staid after Judgment.

his own Attorney's Bill tax'd; but not the Attorney's of another Person.

Smith and Lidcote.

How far the Court will not allow a Person to proceed on a second Notice of Trial, till he has paid the Costs of the first.

THIS was a Motion that the Plaintiff might not go on to Trial without first paying the Costs of the former Notice. The Court seem'd first of all to think, that the Defendant ought to have applied by Way of Attachment for the Plaintiff's not paying Costs. But yet, as it appear'd the Plaintiff was already in Custody, so that the Attachment would be of but little Service, the Court made a Rule to shew Cause, why he should not be hindered. And in another Day of this Term the Court made the Rule absolute.

How far the Court will not quash an Indictment, by Reason that the Defendant did not appear to it in due Time according to his Recognizance.

The King and Morris.

THIS was a Motion to quash an Indictment. But it came out that the Defendant had forfeited his Recognizance for appearing; the Condition of it being, That he should appear as of last Michaelmas Term; whereas the Master informed the Court, that he did not appear till Hilary Term. And in these Cases the Court said they never quashed them.

Wiltshire and Wiltshire.

What shall not be said to be a good Service of a Declaration upon a Prisoner.

A Motion was made to set aside a Judgment, and that a Supersedeas may issue to discharge the Defendant out of Custody, upon his finding common Bail. The Case was, that the Defendant was in Custody by Virtue of a Latitat, and that the Plaintiff had neither serv'd the Defendant himself nor the Turnkey with a Copy of the Declaration, but a mere Stranger. Upon this the Court ordered the Irregularity to be referred to the Master.

Holdels and Cornwall.

How far upon a Writ of Inquiry the Jury cannot give the Plaintiff Damages to the Time of executing the Writ.

ON Motion to set aside a Writ of Inquiry. One Reason given was, that there was indeed a Note produc'd, which the Plaintiff said was under the Defendant's Hand; but the Defendant offered to give Evidence, that it was not his Hand; and yet the Under-Sheriff would not allow him to do it. But the Court was of Opinion, that this was no Reason to set it aside; for it appeared that the Plaintiff had declared upon this Note; and the Defendant let Judgment go against him by Nil dicit; so that he had already confess'd its being his Note; and therefore could not come then and deny it. The other Reason given for it was, that the Jury had given the Plaintiff Interest and Damages to the Time of executing the Writ. And this the Court said, was irregular. Therefore the Counsel desired Time to answer that Part of the Affidavit; which was granted them.

The King and Marth.

ON Motion to quash an Indictment. The Exception to it was, that it charged the Defendant only with digging a Ditch in quodam compascuo sive vacuo adjungen' to a Highway ad commune nocumentum of all those, who pass over this void Piece of Ground. Now the Counsel said, it does not appear that such an Act as this is a common Nuisance, for the Place might be a private Property. But the Court said, they never do quash Indictments for common Nuisances; and therefore they would not enter into the Exception; for that would be overturning the very main Design of the Rule. But where it appears, that the Court where the Indictment is taken has no Jurisdiction in those Cases, this Court will quash them. As in the Case of Indictments of Perjury at the Quarter Sessions.

How far the Court will not quash an Indictment for a Nuisance.

Hawkins and Robinson.

THIS was a Writ of Error upon a Judgment in the Common Pleas in an Action upon the Case for several Promises. The Exception to one of the Counts was, that it was an Action as of last Michaelmas Term, which must be intended as of the first Day in the Term, whereas the Cause of Action does not appear to have been till the Middle of it. But the Court said, that the Demand of the Money was indeed laid to have been in the Middle of the Term; but it was mere Surplusage to lay any Demand at all in this Case. Therefore the Judgment was affirmed.

How far an Action shall not be said to be brought before the Cause of it arose.

Wyat and Wynkworth.

THIS was a Motion for an Attachment against a Witness for not appearing at the Trial, upon which the Plaintiff was nonsuited. The Case of Hammond and Steward, Mich. 8 Geo. I. was cited, where this Court granted a Motion of this Nature. The same was done in the Exchequer, Mich. 10 Geo. I. in the Case of Dalison and Aland. And therefore the Court made a Rule to shew Cause, why it should not go in this Case, upon Account of the Defendant's having tamper'd with him. And they said, that his not appearing was a Contempt to the Process of this Court.

How far the Court will grant an Attachment against a Witness for not attending at the Trial.

Felila and Rawlins.

THIS was an Action for several Promises. The Defendant pleaded, that he is chargeable as Bailiff, and therefore the Action ought to have been in Account, and concludes, & ideo petit quod narratio cassetur. Upon which the Plaintiff demurs. But the Court said, that the Plea is in Bar; and that is the Difference between where a Plea concludes in this Way, and where it concludes quod Billa cassetur; for that is only in Abatement. So Judgment in Bar was given in this Case.

What shall be said to be a Plea in Bar, and not in Abatement, by Reason of the Conclusion of it.

N

Anony-

Anonymus.

How far the Court will not grant an Attachment for disobeying a Judge's Order.

MOTION was made for an Attachment against an Attorney for not obeying an Order of Mr. Justice Page. But the Chief Justice said, that the Method of Proceeding against Persons, that disobey Orders made at the Judges Chambers, was settled about two Years ago. And the Judges agreed it should be, by moving the Court, that the Party might shew Cause, why the Orders should not be performed. Which was done accordingly in this Case.

The King and The Overseers of the Poor of Colbitch.

What Things the Sessions cannot order the Overseers of the Poor to do.

AN Order of Sessions was made upon the Overseers of this Parish, that they should pay a Surgeon his Bill for curing certain Poor under their Care. The Court said, that the Sessions have no Power to make such Orders; and so quashed it.

Field and Gooding.

How far a Declaration shall only be considered to be of that Term, in which Notice was given of it.

THIS was an Action upon the late Act of Parliament to prevent vexatious Arrests. The Case was, that the Plaintiff filed his Declaration of last Michaelmas Term; but did not give Notice of it till Hilary Term; notwithstanding this the Plaintiff entered up Judgment for want of a Plea as of that Hilary Term. Upon this the Court set aside the Judgment; and said, that it was a Rule, that the Declaration is only to be considered as a Declaration of that Term in which the Notice was given.

Reynolds and Thorp.

The Certainty required in an Avowry.

THIS was a Writ of Error upon a Judgment in the Common Pleas on a Replevin. The Defendant avowed there for Rent; and pleaded, that one A. having sufficient Estate in the Lands in Question, demis'd them to the Avowant for the Term of twenty Years, and he over to the Plaintiff for ten, reserving a certain Rent; that the Rent was behind, and so he distrained. Upon which the Plaintiff demurs; and shews for Cause specially in his Demurrer, that the Avowant has not laid a sufficient Estate in A. by setting forth to the Court, what it was. Upon which the Court below gave Judgment for the Plaintiff, and now that Judgment was affirmed. The Reason, which the Court gave, was, that an Avowry is not in this Respect of the Nature of a Declaration; for the general Issue cannot be pleaded to it; and therefore every Thing must be set out certain in it. For this Reason, they admitted, that this would have been otherwise in the Case of Debt for Rent. And this Point, they said, has been lately settled in the Case of Silley and Dalley. Salk. 562. Vide 3 Cro. 22. Syd. 297. 2 Ven. 102, 253, 271. Skin. 624.

Crutchfield and Scot.

THIS was an Action brought by an Executor. The Defendant desired to bring a certain Sum into Court, and that it might be struck out of the Declaration. Whether this could be done in the Case where an Executor is Plaintiff, was the Question. The Court was of Opinion, that it might. And the Case of Baker and Turberville, Mich. 3 Geo. 1. was cited by Mr. Thomson, where, he said, this Motion was allowed. The Court ask'd Mr. Reeves, whether he remembered that Case, who said, he did. Now in this Case if the Plaintiff should go on, and not prove more than is brought in, accordingly the Motion was refused.

How far a Person shall be allowed to bring Money into Court, notwithstanding the Plaintiff is Executor

Berry and Cross.

THE Plaintiff declar'd in Prohibition, and recover'd. The Question was, from what Time the Defendant should pay Costs? And the Court was of Opinion, that he ought to pay Costs from the very first Application for the Prohibition; for the whole is but one Suit; and the Statute of 8 & 9 W. 3. which gives the Costs in this Case, says, that the Plaintiff shall pay the Costs of Suit. Mr. Fazacherly said, that this very Point was determined some Time ago in the Exchequer in the Case of Sir Henry Houghton and Starkey.

From what Time the Party shall pay Costs in Case of a Prohibition.

Botamley and Harrison.

ERROR was brought on a Judgment in the Common Pleas in an Action of Trover. Exception was taken, that the Declaration charged the Defendant with finding unam Parcellam of Pack-Cloth, Rappers and Coys, which the Counsel said was not certain enough; Parcellam being a Word of an uncertain Signification. And this same Exception they said was allow'd in a Case depending, Hil. 1726. But the Court said, that Parcella seems here to signify a Parcel or Bundel of Goods, which is certain enough. Indeed in Replevin, &c. this would not be good; for there the Thing itself is to be recovered. But here only Damages. However it stood over. Lev. 303. V. 50.

The Certainty required in describing the Things which an Action of Trover is brought for.

The King and Wakeford.

ON Motion to quash an Indictment for disobeying an Order of Sessions. The Exception taken to it was, that the very Order itself was quash'd this Morning. But the Court said, they could not quash Indictments for Faults not appearing in them, but only shewn to the Court by Matter extrinical.

The

The King and Hayes.

How far a
Special Ver-
dict shall be
said to be
sufficient.

THE Defendant was indicted for forging a particular Bond, and then for publishing it, and afterwards for publishing a Bond forged generally. The Jury give a Special Verdict; and find that the Defendant committed the two first Facts charged in the Indictment; but say nothing as to the Third; yet at last they come with a general Conclusion, and submit the whole Matter to the Court to judge de malegesturis prædictis; and according as the Court shall be of Opinion, they find the Defendant Guilty or Not guilty. The Question now was, whether this Verdict was perfect and compleat enough, so as that the Court might give Judgment upon it, or whether it was imperfect, so as that the Court must award a new Venire facias. 'Twas objected strongly on the Part of the Defendant, that the Verdict was imperfect; for the Jury find nothing as to one Part; and then the general Conclusion contrary to the Premises cannot make it good. To this Purpose the Case of Auncelme ver. Auncelme, 2 Cro. 31. was relied upon. Another Case was put; and that was, that if a Man was indicted for striking A. B. and C. and the Jury should find, that he lift up his Hand to strike at A. and B. and struck at them, but mist them; and so should conclude in as general a Manner, as in the Case at Bar; the Counsel said, that this Verdict would be imperfect. This Case the Court admitted; but they said, it was distinguishable from the Case at Bar; for there the Defendant is charged with one Fact in the Indictment, and the Verdict finds, that he did another, which is no Answer: But in the Case at Bar the Defendant is charged with three Facts; to two of them the Jury give a positive Answer, and then make a general Conclusion, by which the Whole is submitted to the Court; so that here the whole Evidence given to the Jury is laid before the Court; and the Court is to judge upon the Evidence found as they shall think proper. By this it appears, that the Jury had taken into their Consideration all the Charges; but they thought the Court the properest Judges of what ought to be done upon the Evidence given. This same Answer too makes a clear Distinction between the Case in Crooke and our Case; for there it appear'd that the Jury had found but Part of the Fact; and there was nothing to shew, that they had thought any Thing about the other Part. So the Court said Judgment should be given for the King as to the Two first Charges; and acquitted the Defendant as to the other.

Fox and Halpyn.

How far the
Plaintiff can
not be intitled
to sign
Judgment
against the
casual E-
jector.

THIS was a Motion to set aside a Judgment in Ejectment against the casual Ejector. The Case was, that a Rule was made for Judgment in Ejectment against the casual Ejector; the Terms of which are, unless the Tenant of the Land shall appear and plead, Judgment shall go against him. The Tenant of the Land did not appear and plead, and therefore the Rule of Course made itself absolute, and accordingly Judgment was sign'd, and Execution taken upon it. Application was made to set this Judgment aside.

aside. The Reason given was, that tho' in the Rule drawn up there is nothing else express'd but these Words, unless the Tenant, &c. yet there is something else implied precedent to the Tenant's being obliged to plead, and that is, that the Plaintiff should join with the Defendant in a Rule, which is to be sign'd by a Judge, by which the Defendant is bound to appear and plead, and confess Lease, Entry and Duffer. Now in this Case the Defendant could not get the Plaintiff to join with him in such Rule; and therefore as yet he was not bound to appear and plead. For which Cause the Court held the Judgment sign'd in this Case to be irregular; and accordingly set it aside.

Watkins and West.

THIS was an Action of Trover for taking two Dishes, against two Officers of an inferior Jurisdiction in the Borough of Hurst. The Defendants pleaded, that they took them by Distingas, by Virtue of a Plaint levied in that Court; upon which the Plaintiff demurred generally. Now Exception was taken to the Plea, for its being not shewn how the Cause arose within that Jurisdiction. But the Court said, that this indeed has been formerly a Point much controverted, whether in the Case of an Officer 'tis necessary to shew how the Cause of Action arose within such Jurisdiction; but this has been fully settled in the Case of Pool and Gwyn, Lutw. 2. 935. That in the Case of an Officer 'tis not necessary; so that now they would not allow that to be disputed again. Another Exception was then taken, that the Defendants had set out the Precept to have been made *Ballivis Burgi prædicti*, and that they executed it as Bailiffs *Curiæ prædictæ*; so that the Counsel said, that it did not appear that the Defendants had any Authority given them by this Warrant. Upon this Exception it stood over. V. 50.

When an Officer of an inferior Court justifies under Process of that Court, what shall be said to be a good Plea of that Sort.

Boot and Grayham.

THE Defendant being a Member and Resident of the University of Oxford, was sued in this Court upon a Contract he entered into in London. And now the Chancellor of Oxford came primo die, and demanded that his Plea of Conusance might be allow'd; King Edward the Third giving the University a distinct Jurisdiction by his Charter, which was confirm'd by Parliament, to hold Plea of all Matters, which a Member and Resident of the University is concerned in, except such as relate to Matters of Freehold; by which same Charter all Judges are prohibited to proceed in any of these Causes, after the Chancellor has put in his Claim. But now an Exception was taken to the Panner of this Claim put in; upon Account of the Defendant's Residence being only certified by the Chancellor, and not verified by Affidavit. The Court seem'd to be of Opinion, that this Exception had a good Deal of Weight in it; for they said, a Judge cannot certify a Matter of Fact of this Sort which will be final, but only Matters appearing upon Record; and they said, that the bare being upon the Matriculation Roll will not be enough in this Case, but it is equally necessary

How far Persons may be sued in the Courts of Westminster-Hall, notwithstanding they are Members of one of the Universities.

necessary that such Person should be resident in the University. So upon this Exception it stood over to another Day.

Vide 47.

Botamley and Harrison.

THIS Matter now coming on again, the Court seem'd to think, that Parcella was a Word too uncertain. Thereupon Mr. Strange cited a Case in 2 Lev. 195. where Parcella ponsarum lancearum, Anglice a Quantity of Woollen Parn, was held to be bad. Indeed the Court admitted, that if in the Case in Question, it had been laid, Anglice a Parcel or Bundel, that would have been good; for in our Language a Parcel, or Bundel of Goods are of a certain Signification. However it stood over again.

Ante 49.

Watkins and West.

THIS Matter now coming on again, the second Exception was chiefly spoke to. Serjeant Hawkins said, that these Persons who were Bailiffs of the Court might have been Bailiffs of the Borough too; and argumentatively it does appear that they were; for it is laid in the Plea, that they being Bailiffs Curiae praedictae took the Distress virtute praepcepti praedicti. Now they could not take it by Virtue of this Precept, unless they were Bailiffs of the Borough too. And he laid it down for a General Rule, that Defeas in Pleas, which may be made good by Argument, cannot be taken Advantage of upon general Demurrers. To this Purpose he cited a Case in Cro. 3. 746. where 'tis held, that a Person's declaring that he was Lessee at Will, without averring the Life of the Lessor, was good upon a General Demurrer; in as much as it was laid in the Declaration, that he was possessed of the Lands by Virtue of the Lease aforesaid. Vide Aleyn 48. to the same Purpose. The Court were inclin'd to think, that this gave an Answer to the Exception; but it stood over.

The King and Budget.

Upon what Day a Writ ought to be returnable.

THIS was an Information, on which the Defendant was convicted for a Libel. And now an Exception was taken to the Return of the Distringas, with an Intent to have a new Distringas, and so a new Trial awarded. The Exception was, that the Writ is returnable die Martis prox' Octabis Sancti Hillarii; whereas it ought to have been Die Martis prox' post, &c. And the Defendant's Counsel said, that as it is put the Tuesday next to the Eve of St. Hillary generally, it is uncertain which Tuesday is meant, upon the Face of the Return, whether that before the Eve or that after; and if it was meant that before, it is not good, for the Jury must be order'd to appear at a Day within the Term, and the Tuesday before is out of Term. They said too, it will be no Answer to this to say, that in this Case the Eve of St. Hillary fell on a Saturday, and therefore the Tuesday nearest to the Eve must be the Tuesday within the Term; for the Return Days must be certain, and good at all Events, and not depend upon Contingencies, whether they will be

be good or not; whereas in this Case it is intirely accidental, whether it is good or not; for if the Oxave had fell upon the Thursday or Friday, it clearly would have been bad. To this Purpose Mr. Strange cited the Case of Sayer and Milton, Mic. 12 of the late King, where the Return of a Scire facias was die Jovis prox' post Octabis Sancti Martini, whereas the common Form of these Returns is Quindena Martini; now in that Case it happen'd that the Oxave fell upon a Thursday, and therefore the Thursday after was exactly the Quindena Martini; but yet as this was only accidental and not appearing to be good upon its self, the Court there held it to be bad. The Court was divided in their Opinions upon this Exception; and therefore it stood over.

The King and Burden and Wakeford.

THIS was a Motion to quash an Order of Sessions. The Case was, that the Mayor of a certain Town set up a Custom, that the Jury of the Court-Leet there ought to make a List every Year of five Persons, which should be presented to the Mayor, and that the Mayor ought to choose one out of the Number for Constable, and that the Jury should choose the other out of the remaining Four; now this Year the Jury had made no List, but the Parishioners chose the Constables themselves. Upon this the Mayor applied to the Court of Sessions, and they made an Order of Discharge of one of the Constables, and that the Mayor's Constable, whom he nominated in Default of the Jury's giving him a List, should be confirm'd. The Court now quash'd this Order; for they said the only Statute, that gives the Justices Power at all in Relation to Constables, is the Statute of 13 & 14 Car. 2. cap. 12, 15. and that it only gives Justices Power to put in Constables in Default of the Court-Leet; but does not impower them to discharge Constables already put in. Accordingly the Order was quash'd.

How far Justices of Peace have not a Power of removing Constables from their Office.

Wiltshire and Wiltshire.

Vide 44

THIS Matter now came on again, but the Master did not report that for an Irregularity, which is complained of there, but another Thing; and that is, that the Plaintiff gave the Defendant Rules to plead without making the Affidavit that is requisite in these Cases, where a Man declares against one that is in Custody. The Affidavit contains several Things, one of which is, that the Defendant is in Custody by Virtue of a Process of this Court. And this the Chief Justice said was necessary; for he remembred all the Judges meeting upon the Act of 4 & 5 Will. & Mar. cap. 21. and making this Rule upon it, that such an Affidavit should be filed in all these Cases. Accordingly the Judgment was set aside. But the Supersedeas was not granted, because the Defendant was already in Execution at another Suit; so the Court only ordered that he should be charged in Execution with a fresh Action.

How far an Affidavit is necessary to be made, when a Person, who is in actual Custody has a Declaration deliver'd against him.

The

The King *and* Porter and others.

How far a
Person, who
owns himself
perjured,
shall not be
credited.

AN Information was moved for against the Defendants for seducing a Man's Wife, that was under Age, to take a great Part of her Husband's Goods and delivering them to one of the Defendants that was her Mother, and for persuading her to swear the Peace against her Husband; whereas the Wife came now and swore, that she had no Manner of Cause to do it, and that this Seducement was done only to make Alteration between her Husband and her. But the Court said, that they would never grant Informations upon the Oath of a Person, who comes and says, that she before swore herself.

The King *and* The Bishop of Chester.

How far the
Court will
not grant a
Mandamus,
where there
is a Visitor
appointed.

THIS was a Mandamus, directed to the Bishop of Chester as Warden of Manchester-College, to swear in one Mr. Ashton Chaplain of that College. The Warden returns, that this College is of a Royal Foundation, and that King Charles the First made the Bishops of Chester for the Time being Visitors of it, and so concludes, that no Mandamus ought to go to him. As to this the Court did admit, that in all these Eleemosynary Societies, where there is a Visitor appointed, either by Act of Law, or by Act of the Party, the Court cannot interpose, unless in those Cases where the Visitorial Authority is suspended or extinct. But that this Authority is sometimes so, they said, was evident, from the common Question that is always ask'd in these Applications for Mandamus's, whether there is any Body that can visit. Now, they said, that this Question can only be applied to Suspensions or Extinguishments of this Authority; for in every one of these Eleemosynary Bodies there necessarily must be one upon the Foundation of those Bodies, who has a general Right of Visiting in general Cases. The Court said, they would then consider, whether any Body has a Right of Visiting in this particular Case now in Question. The Bishop 'tis clear cannot; for he is party and therefore cannot be Judge. The King cannot; for he has transferred his whole Right of Visiting to the Bishop. Therefore this Case must fall within the general Current of Redress, in which all other Cases do. There was tho' one Case, which Mr. Lee cited out of a Collection of Cases in Relation to the Privileges of the Universities. It was, that by the Statute of All-Souls College in Oxford, the Archbishop of Canterbury is made Visitor of it; and the Statute farther says, that if the Fellows cannot agree to choose a Master within such a Time, the Right of Nomination shall devolve to the Archbishop. The Fellows did not agree; upon which the Archbishop nominated one to them, and they refused to admit him. The Archbishop visited them, and compelled them to do it; and they rested under it; which, Mr. Lee said, is an Argument, that they were advised, that they could have

have no Redress elsewhere. The Court said, they were not obliged to consider how that Case was; but the Chief Justice and Judge Reynolds said, that they did not know, but there might be a Difference. Upon which the Court made a Peremptory Rule upon the Bishop Nisi on Monday; and that Day made it absolute.

Williamson and Dyer.

THIS was a Writ of Error upon a Judgment in Ireland; and now Motion was made, that the Court would set it aside, unless the Plaintiff would assign his Errors in due Time; he having not proceeded in it for a long while. Which the Court granted; and farther said, that in Writs of Error upon Judgments in the Common Pleas, the Defendant may Non-pross them himself without applying to the Court.

When a Writ of Error is brought on a Judgment in Ireland, how far the Court above will help the Party to assign his Errors.

The King and The Inhabitants of Caywood.

THIS Matter now coming on again, Mr. Reeves said, he did remember a Case, where the Court had gone as far as in this Case, if they should allow this Word Ulleskelf to be good instead of Uleskelf. And that was the Case of Young and Slatford, which was argued Trin. 8 Ann. There, he said, was an Exception taken to a Variance between the Venire and the Distringas; the one ordering the Jury to come out of the Parish of Chiddingfold; the other, out of the Parish of Chiddingsford; but yet the Court held this Variance to be immaterial in Arrest of Judgment; and accordingly the Defendant was actually hang'd. This he said, was a stronger Case than ours, for that was in the Case of Felony. So that the Court only minds in these Cases, whether the Words be eadem sonantia or not. Upon this Case the Matter stood over.

Post Page 60.

The King and The Bailiffs of Bridgnorth.

A Mandamus went to the two Bailiffs of this Town to admit a Man into the Office of Chamberlain. No Return was made to it. Upon which an Attachment was moved for. And the Court granted it against them both, though Affidavit was made that one of them was always willing to make a Return, but could not, because the other had got the Mandamus into his own Hands, and would not let him have it. The Reason the Court gave was, that they were both to be considered as one Officer to them.

How far one joint Officer shall be answerable for the Acts of the other.

Muttit and Denny and others.

THIS was an Ejectment to try the Right of an Estate. It was moved in Arrest of Judgment, that there was a Mistake in the Nisi prius Rolls, the Action being brought against two Persons for entering upon the Plaintiff, and the Expulsion being laid against one only, and him not a Defendant.

How far Amendments shall be allowed in an Ejectment.

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Now

Now Application was made to amend this Mistake; for the Counsel said they had something to amend by, and that was the Plea-Roll; every Thing being Right but this Part of the Nisi prius Roll, and the same Part in the Copy of the Issue. And Mr. Lee said, that Cjeamments are Creatures of the Court, and feigned Suits to put the very Right in Trial; and therefore though in other Cases this might not perhaps be amendable, yet in Cjeamments, he hop'd it would. To this purpose the Bishop of Worcester's Case, Sel. 48. was cited, where there were seven Defendants, and two omitted in the Nisi prius Roll, and yet that was amended. Upon this it stood over. And afterwards it was amended.

Matthews and Spicer.

How far the Plaintiff shall be allowed to vary the Time which he alledged by his Declaration that his Cause of Action arose in.

THIS was an Assumpsit for depasturing of Sheep; the Plaintiff declares for four Pounds ten Shillings, and says that he demanded the Money on the 26th of March; the Defendant pleaded a Tender on the 16th, ante exhibitionem billæ prædictæ; the Plaintiff replies, that he prosecuted his Latitat on the 12th of February. Upon which the Defendant demurs. The Reason which the Counsel gave, was, that the Plaintiff had precluded himself to say, that his Action commenced the 12th of February; when he had before said the Cause of it to have begun the 26th of March. But the Court said, that the Party is indeed precluded to do this himself of his own accord; but he is not precluded, when the other Party insists upon the Day, and would make that material. Accordingly the Court was going to give Judgment for the Plaintiff, but upon a Doubt of Mr. Justice Page, it was ordered to stand over.

Shaw and Wey.

What Words in a Will give an Estate for Life only, and not an Estate-Tail.

THIS was a Writ of Error upon a Judgment given at the Grand Sessions in the County of Flint. It was in an Cjeament. And now the Difficulty arose upon the Words of a Will, that were found in a Special Verdict. They were to this Effect, I give unto my Sisters, Anne Lunsford and Dorothy Evans, the Lands in Question for their Lives, without committing Waste, and if either of my Sisters die leaving Issue of their Bodies lawfully begotten or to be begotten, then to such Issue or Issues the Mother's Share; or else to the Survivor or Survivors of them, and their respective Issue or Issues; and if they die without such Issue or Issues, then he limited Remainders over. The Question was, what Estate the Sisters took, whether for Life or in Tail? And the Court was of Opinion, that they took an Estate for Life only. They said the Words, that make this very thing doubtful, were those that give the Lands to the Issue after the Death of the Sisters; but whether it be the Testator's intent, that they should take by Descent or Purchase, that must be left to the general Meaning of this Clause. Now, they said, the first Part of the Clause clearly made for an Estate for Life, the Lands being given

given to them for their Lives, without committing Waste; but then the next Clause in Relation to the Issue makes the Difficulty in the Case; and they did admit, that if the Words had gone no farther, the Sisters would have had an Estate in Tail, unless the conditional Words make a Difference. And this appears by the Case of King and Melling, Keb. 99. which Case the Court said was certainly Law; and it has been admitted so in Chancery and in Parliament; but then they said, they would not carry these Constructions one Inch farther than that Case has gone. Then what is the Effect of the next Words in this Clause? The Design of them plainly is to make the Issue of the first Issue inherit as Heirs to them, and not to the Sisters; by which it is plain that the Interest of the first Issue was chiefly respected; that the Words relating to them were put in for a designatio Personarum of the Issue, and not for a Limitation of the Estate of the Sisters, which the Court said was the direct Difference between the Case of King and Melling and the Case at Bar. Accordingly the Judgment below was reversed.

Term. Trin.

2 Geo. II. 1728.

Giles and Venfon.

How far an Attachment shall not be granted against a Person for a Contempt of the Process of the Court.

A Motion was made for an Attachment against the Defendant for speaking Contemptuous Words of the Court at the Time he was serv'd with a Writ of Privilege. But it appearing, that the Defendant only told the Plaintiff he would make him eat it, if he left it with him, the Court thought that would hardly be enough; but yet made a Rule upon him to shew Cause. Judge Reynolds mentioned a much stronger Case than this, which was about two Years ago, where a Defendant actually made a Bailiff eat a Writ, which he serv'd him with; and yet the Court would not there grant an Attachment.

Barber and Evans.

When a Judgment is entered up on a Warrant of Attorney how far the Court will set it aside by Reason

THIS was an Irregularity of a Judgment, that was referred to the Master. The Master reported, that the Judgment was entered up upon a Warrant of Attorney; but that the Warrant of Attorney was forg'd by the Plaintiff. Upon this the Court set aside the Judgment and awarded Restitution, and ordered the Plaintiff too to be indicted.

that the Warrant of Attorney was forged.

The King and Weston.

How far an Information shall not be granted for Perjury.

AN Affidavit was made, that Pool is a Town and County of itself, and not within the County of Dorset. But yet the Pool Men for the last two Elections pretended to have a Right to Vote for Knights of that Shire; and accordingly at this last Election the Defendant did vote amongst them, as being a Pool Man; and took the usual Oath of his having a Freehold within the County; but yet had no pretence to have any but

but only at Pool. Upon this the Court was moved to grant an Information against him for Perjury; because the Counsel said they had a Design to try the Right in this Way. But Judge Reynolds said, the Court would never allow a Matter of Right to be tried in an Information for Perjury; and accordingly they refused to grant it. And the Chief Justice said, that they very rarely granted Informations for these Offences; for they are too great to punish in this Way.

Anonymus.

Affidavit was made, that the Plaintiff had commenced an Action in the Court of Lisbon beyond Sea against the Defendant for the same Cause as was then and is now depending between them in this Court. And upon this the Court was moved to make a Rule upon the Plaintiff not to proceed there; but they said, they could not do it.

How far the Court cannot hinder a Person from Proceeding at the same Time in two different Actions.

Mathews and Spicer.

THIS Matter now came on again, and the Point there was determin'd for the same Reasons the Court then gave. And the Court said farther, that they thought there was a clear Difference between this Case, where the Day is not material, and where it is Part of the Contract; for they admitted, that where it is Part of the Contract, the Day cannot be departed from; for a new Day in those Cases makes a new Contract. They said too, that where the Proceedings are closed, and a Writ of Error brought, it was clear the Day could not be altered; for there the Court above is only to judge upon the Record; and upon the Record it appears to be wrong. And this is the Case in 1 Roll. 792. Another Point was started too by the Counsel, and that was a Distinction between these Cases where the Suit is by Latitat, and others where it is by Original; for he said, a Latitat will be good, tho' it be taken out before the Cause of Action arises, provided the Defendant is not arrested upon it before that Time; but an Original will not. And what Mr. Justice Page said, confirm'd this; for he said, the Latitat is no Part of the Record, whereas an Original is. Vide 2 Cro. 561. 3 Cro. 271, 325. 1 Ven. 28.

Vide ante 54.

Lock and Johnson.

A Motion was made to supersede a Capias, that was directed to the Bishop of Durham. The Exception to it was, that the Writ order'd him to take the Defendant; whereas it only ought to have order'd him to make out a Writ to the Sheriff to take him. And Mr. Fazakerly said farther, that these Writs directed to the Bishop of Durham pay him a higher Respect than those directed into other Counties Palatine do those Persons; for those only order them to cause the Defendant to be taken. Accordingly the Court set the Writ aside, quia erronee emanavit.

What shall not be said to be a good Writ, which is directed to the Bishop of Durham.

The King *and* Lawrence and others.

What shall
be a good
Appointment
of Elisors.

Application was made to the Court to appoint Elisors in this Case, whom the Venire should be directed to; the Sheriff and Coroner being both Parties. The Counsel said, that their being Parties was entered upon the Roll. And this the Court said was necessary; otherwise it would be Error upon the Record. They said farther, that a Rule must be made upon the Parties to attend the Master, and he must appoint the Elisors; accordingly made a Rule to shew Cause.

The King *and* Robinson.

How far Bail
shall be ne-
cessary to be
given upon
an Attach-
ment.

THE Defendant was brought up by Attachment for a Return. And now Mr. Strange moved, that he might give Bail to it; and he said, it is not long, that Bail in these Cases has been required at all. Which was accordingly done.

Tenton *and* Best.

When a Pro-
cess issues
from the
Courts of
Westminster-
Hall into a
County Pa-
latine, what
shall be the
proper Man-
ner of in-
forcing such
Process.

THIS was a Motion for an Attachment against the Defendant, who was a Clerk of the Duchy Court of Lancaster, for not making out Process upon a Record of this Court, that was sent down by Mitimus. And the Court said, it was the Practice now to move for Attachments against the inferior Officers of these Courts upon such Occasions, and not against the Superior Officer; and accordingly the Court granted it in this Case. Mr. Fazakerly took an Occasion to enlarge a little upon the Jurisdiction of these County Palatines; and he said, that wherever a local Action is brought in these Superior Courts upon a Matter arising in one of those inferior Jurisdictions, this is Error, whether the Defendant pleads to the Jurisdiction or not; wherever a transitory Action is brought here for a Matter arising there, and that appears upon the Pleadings, that is Error, but yet the Defendant can only plead to the Jurisdiction, where the Cause of Action appears to arise there upon the Plaintiff's Declaration. Vide 4 Inst. 123, 223. in Proof of both these Distinctions.

Scrimshaw *and* Proctor.

How far the
Court will set
aside the
Verdict,
when there
is no De-
fence made
at the Trial.

THIS was a Rule to shew Cause, why a Verdict should not be set aside, there being no Defence. That which was moved was, that there was a small Mistake in the Copy of the Issue delivered, it concluding & prædictus querens similiter, whereas it ought to have concluded, & prædictus defendens, &c. And the Court said, that let it be ever so immaterial a Mistake, it is irregular; and as it is in the Copy of the Issue we must stay the Judgment upon it.

Tulley and Sparks.

THIS was an Action of Debt upon a Bond for the Penal Sum of 800*l*. The Plaintiff sets forth the Whole of it in his Declaration; and shews the Condition of it to have been, that in Case the Obligor should marry one Martha Latimer, and she should survive him, his Heirs, Executors, &c. should pay the Obligee the Sum of 400*l*. in Trust for her within two Months after his Death. And then the Plaintiff avers, that the Marriage did take Effect, that the Obligor died, and the Wife survived him; then sets forth, that the two Months pass'd, and the Executor never paid the Money; by Reason of which the Obligee now brings his Action against the Defendant, being Executor to the Obligor. The Defendant pleads, that sometime after the Obligor married this Martha Latimer, he became a Bankrupt, and so pleads the Certificate in Bar. Upon which the Plaintiff demurs. And the Court upon Argument was now of Opinion for him. For they said, at the Time the Commission of Bankruptcy was taken out, it was intirely uncertain, whether the Plaintiff should ever have any Demand upon this Bond; and consequently he could not be obliged to come in with the rest of the Creditors. The only Thing, which gives any Colour of Difficulty in this Case is the Statute of 7 Geo. 1. cap. 31. But the Court said, this Statute only extends to Creditors at a future Day certain; and not to mere contingent Creditors, as this Case is. They said further, that it seemed clear he could not be prejudiced for not coming in; because if he had come in, it would have done him no Service. This was what was said by the Court in Relation to the Insufficiency of the Defendant's Plea as to the Matter of it. Another Fault they found as to the Manner of it; and that was, that it does not set forth any Petition to have been made to my Lord Chancellor; and without this the Court said the Chancellor has no Right to grant it. It is true the Defendant pleaded, that the Commission was debita juris forma super Scar'; but the Court said, that was not enough. So that the Act of Bankruptcy as it stands upon the Plea is no Bar; as it does not appear to have been regular. Accordingly they made a Rule for Judgment for the Plaintiff nisi. Vide . This Matter came on next Term upon a new Action; and the Court was of the same Opinion. Salk. 521.

What are such Creditors as shall not be bound to come in as Creditors under a Commission of Bankruptcy.

Curser and Smith.

THIS was a Motion for a Mandamus to be directed to the Bailiffs and Steward of the Court in Andover, to order them to go on in the Proceedings of a Cause in that Court. The Court said, that there was no doubt but Mandamus's lie in these Cases; but they doubted whether they could grant it without an Affidavit. Mr. Lacey said, that he did not apply for this Mandamus for any wilful Delay of Justice in this Case, but only to hasten on the Proceedings; and therefore he thought the Court might grant it without an Affidavit. And he said this was

How far the Court will grant a Mandamus without an Affidavit.

was like the Case, where a Justice of Peace refuses to sign a Rate. He did admit indeed in Case, where an Attachment is moved for, an Affidavit is requisite. But the Court said, that the Case of the Justice's not signing the Rate was certainly wrong; for 'twas determined lately to the contrary. And Mr. Masterman told the Court, that he remembered a Case, which he employed the Attorney General in, where the Attorney General made such a Motion as in this very Case at Bar; and the Court refused to grant it without an Affidavit. Upon which the Court refused the Motion in this Case; for, they said, they would not suppose Judges would delay Justice.

The King and The Inhabitants of Caywood.

Vide ante 53.

THIS was a Matter that is mentioned before in Page 53. And as to that Case of Young and Slatterford there mentioned, the Chief Justice said, he had order'd that Record to be searched, and as it stands upon the Record, it is all right; so that he suppos'd if that was an Exception, that was made in that Case, it was answered on a sudden, and not relied upon. However Mr. Reeves went on, and cited some more Cases to make the Order good; and one was out of Sir Tho. Jones 219. the Case of Nonne and Maxey. The Plaintiff there declares as Administrator, by the Name of Nonne, and produces Letters of Administration by the Name of Nunne, and it was held good upon a Demurrer to a Plea in Abatement. Another was cited out of 3 Cro. 238. where Shacroft and Shacraft, and Abbotson and Abbatson were held to be the same. The Court seem'd to think these as strong Cases, as that in Question. But it stood over for two or three Days.

Greenhill and Riveloe.

How far the Court will set aside a Plea, by reason of its being frivolous.

TO set aside a Plea. This was Debt upon a Bond; and the Condition was for the Payment of a certain Sum on the thirtieth of April. The Defendant pleaded Payment on the twentieth. The Court said, that this was merely frivolous. For if the Plaintiff should join Issue upon it, and have a Verdict found for him, he could not recover; and if he should demur, the Defendant would not join with him, and so the Plaintiff would lose the Term. Accordingly they set it aside. Judge Page said, this was frequently done in the Common Pleas. Vide a like Case, p. . Vide 3 Cro. 823. 2 Ven. 222.

Lady Faulconbridge and Forrest.

How far the Court will not change the Venue in an Action of Scandalum Magnatum.

THIS was an Action of Scandalum magnatum. And now the Defendant moved to change the Venue from Middlesex into the County Palatine of Chester. And the Counsel said, this was a common Motion in the Exchequer; and Judge Page admitted it. But the Court said, it was an old Rule, that they never changed the Venue into these County Palatinates; because they had no Officers of their own in those Counties. They said farther,

ther, that if this was in the Case of a Peer they would not have alter'd the Venue into any County, where the Action is brought in Middlesex, as this Case is; because Peers are supposed to be resident here about the Business of the Nation. However the Court gave the Counsel Liberty to move it again, if he could find any Thing new to say.

Strangeways and Selby.

IN an Action of Debt upon a Bond, the Defendant demands Oyer, and then sets forth the Condition to be, that he should stand to the Award of three Persons; and avers, that they made no Award. The Plaintiff replies, that they did; and says, that they made their Award on the 21st of December, by Virtue of a Bond of Arbitration bearing Date the 22d of December last past, or thereabouts, (whereas it appeared upon the Plaintiff's Declaration, that the Bond on which he brought his Action bore Date the 22d of September) and then sets forth the Substance of the Award, and assigns a Breach. Upon this the Defendant demurs, and the Court was of Opinion for the Defendant. For they said, that the Submission on which the Arbitrators have made their Award could never be intended to be the same with the Submission contained in the Bond, on which the Plaintiff has declared; as there is so long a Space of Time between them; and therefore no Action can be brought upon this Bond for the not performing such an Award. However this Matter stood over.

What shall
not be said
to be a good
Pleading of
an Award.

More and Jones.

THIS was an Action of Covenant in the Common Pleas. The Plaintiff declares, that the Defendant, per quoddam scriptum factum apud Westmonasterium sub manu sua propria pro consilio impenso & impendendo, granted him an Annuity, and covenanted to pay it him half-yearly; then says, that from the 29th of September in such a Year to the 25th of March in that Year he had never paid him any Thing, so brings his Action for that half year's Payment. The Defendant pleads, that all that Time the Plaintiff never gave him his Counsel. Upon which the Plaintiff demurs. The Defendant did not join in Demurrer; upon which Judgment went by Default, and Error brought. And now the Court was of Opinion against the Plaintiff upon the Face of the Declaration; for they said, an Action of Covenant could not be maintained upon this Writing unless it was a Deed; and it does not appear to be a Deed upon the Face of the Declaration; because it is not laid to be Sigillo suo sigillat'. They said too, that its being laid with a Proferat hic in Curia cannot help it, though it should be found to be a Deed upon producing it. And for a Case in Point the Court cited, that in 3 Cro. 571. They took a Difference likewise between technical Words laid in a Declaration, and such Words as in the Case at Bar; for there they admitted legal Ceremonies might be supplied, but here they cannot. To this Purpose the Case in 3 Cro. 737. was cited. For this Reason they allowed, that if the Plaintiff had said, that the Defendant granted this Annuity

What shall
not be said
to be a good
Pleading of
a Deed.

per factum suum, this would have been good. Upon this the Counsel said, that they would consider Factum in our Case as a Substantive, and not as an Adjective; so that it would be the same as if the Plaintiff had said, that by a written Deed he granted him this Annuity. But the Court in general gave one Answer to this; and that was, that the Writing of this Instrument could not be intended to be done at Westminster, but the making of the Instrument. And Judge Probyn gave another Reason to shew, that this would not do for the Plaintiff; and that was, that according to such a Construction it must be intended, that there was no Sealing and Delivery at Westminster at all; and then clearly it will not be good. However the Counsel urged another Argument, which was, that the Plaintiff lays in the Declaration, that the Defendant did covenant to pay this Annuity by this Writing; and he said, this could be no Covenant, it was not by Deed. But the Court answered, that the Word (Covenant) will not do the Plaintiff's Business in this Case; but he must shew how 'twas such a Covenant on which an Action of Covenant may be maintained. However this stood over to be argued again.

Wright and Kenning.

How far the Court will amend a Writ of Error.

THIS was a Writ of Error upon a Judgment in the Common Pleas. 'Twas tested before the Judgment given, and returnable between the Time of its being given and its being entered on Record. For this Fault the Plaintiff in Error moved to quash his Writ; for he said, it could not remove the Record, as the Judgment was not then entered up; the Words of the Writ being, Si judicium inde redditum sit. He said too, that the Occasion of this was owing to the other Side's not entering it up, as they ought. But the Court said, that they thought they might amend it upon the Statute of 5 Geo. 1. cap. 13. for that Statute intended fully to prevent veratious bringing of Writs of Error; and to that End gives the Court Power to amend any Defects in them. The Case of Grayham and Leech, Mich. 6. of the late King, was indeed cited by the other Side to shew that such Defect could not be amended; but there the Court said, the Writ of Error was tested before any Action commenced below; and it was clear, the Court could not amend a void Writ. However this Matter stood over.

The East-India Company and Lopes.

How far the Court will set aside a Judgment by Reason of a Defect in the Warrant of Attorney.

THIS was a Writ of Error upon a Judgment in a Scire facias against Basil. One Error assign'd was, that it does not appear the Plaintiff had made any Attorney at the Time of the Return of the Writ; whereas he must be in Court then; and as this Case is, the Plaintiff could not be in any other Way, than by Attorney, because it is a Company. And this the Court seem'd to allow. However the Counsel of the other Side said, that it was very true the Warrant of Attorney was not entered up of that Term of which the Return of the Writ was; but it does not appear, but the Warrant of Attorney might have been

been made before that Time; and indeed it is entered up of the very next Term. To this purpose he cited the Case of the common Recovery, where it has been held, that if there is a Tenant to the Præcipe before the Judgment given, 'tis good. But the Court said, that Case was certainly Law, and they remembered when it was determined; but then the Reason of it is, that common Recoveries are common Assurances of the Realm. But they said, in the other Case they did not see much Reason for intending that the Warrant of Attorney was made before it was entered up. Another Error was mentioned, which the Court allowed too; and that was, that by the Judgment there are Damages given upon this Scire facias as well as Costs; the Words of it being pro misis & custagiis, & damnis dilationis executionis. This Error the Court seem'd to allow too; for they said, the Statute of 8 & 9 Will. 3. 10. gives only Costs in these Cases. Stand over.

How far a common Recovery shall be good, provided there is a Tenant to the præcipe before the Judgment given.

How far Damages can be recovered against Bail, but only Costs.

Fox and Halpyn.

Ante 48.

THIS was an Ejectment. And sometime before the Plaintiff had got Judgment, and taken out Execution against the Defendant, but upon Motion that was set aside, and Restitution awarded. But the Plaintiff not delivering up the Possession, an Attachment was moved for. Mr. Lee made one Objection against this Motion, that Halpyn had not been yet made a Defendant in this Cause, which was the very Reason, why the former Judgment was set aside; and till he was made a Defendant, he said, an Attachment could not be moved for against the Plaintiff Fox, for not delivering it him up, so that the Affidavits were wrong titled by titling them in a Cause of Fox and Halpyn. But the Court said, as here had been one or two Motions about this Matter already, they would not allow of such an Exception.

How far an Affidavit shall be said to be duly titled.

Muttit and Denny.

Ante 53.

THIS Matter now coming on again, the Court allowed of the Amendment by putting in Robertus & Johannes in the Room of Georgius, & ejecerunt & expulerunt for ejecit & expulit. However Mr. Reeves made an Objection against it, and said, that the Plea-Roll itself was wrong; and ought to be made agreeable to the Copy of the Issue; for in this feigned Suit the Copy of the Issue is to be the Treason for making up this Part of the Plea-Roll; as in all other Cases the Declaration delivered is. For here no Declaration between the Plaintiff and the Tenant in Possession is ever delivered; but only a Copy of the first Declaration, to which the casual Ejector is Party. The Court admitted, that indeed in common Cases the Plea-Roll shall be made agreeable to the Declaration delivered. But here they said, there is no Declaration ever delivered; and therefore the Defendant cannot suffer any Inconveniences, as in other Cases he may, where it is not made agreeable to the Copy of the Declaration delivered. So that the Plea.

Plea-Roll must at all Events in such Case be intended good. And as to the Copy of the Issue, they said, the Plea-Roll could not be made agreeable to that; for that is a different Part of the Proceedings.

Ante 41.

The King and Dr. Newton.

THIS Matter now coming on again, the former Rule there was made absolute. For the Court said, it would be a Thing of dangerous Consequence to let such a Matter as this pass without taking Notice of it in a pretty severe Manner. The Counsel for the Defendants though said, that the Wife had been guilty of very unjust Practices to her Husband by being taken in an Adulterous Correspondence; and therefore it was certain, the Husband might justify confining her in his own House, and for the same Reason in another Person's House, if it was not a Mad-house; and they said, they could not see, how its being a Mad-house could make such Difference. The Court admitted, that a Man might confine his Wife in his own House for proper Reasons; but they said, they would never allow of such Things as this.

The King and Martyn.

How far the Court will give Leave, that an Information may be amended.

AN Information had been granted in this Case against the Clerk of the Peace for not entering an Order of Sessions according as it was pronounced. And now Application was made to the Court for Leave to alter it by making the Facts charged in the Information agreeable to the Facts charged in the Affidavit, on which the Information was granted. The Mistake was, that the Order of Sessions has laid in the Information to have been at Easter 1722. whereas it ought to have been in 1723. And a Rule was made to shew Cause.

Strangeways and Selby.

THIS was a Matter that is mentioned before in Page 61. but now it came on upon a different Application; which was, that the Record might be made according to the original Proceedings; there being a Mistake made by the Clerk in the Date of the Award, by making it the 22d of December, whereas it ought to have been the 22d of September. But the Court said, they must hear the other Side; and afterwards made the Rule absolute upon the common Terms of paying Costs, &c.

Botam-

Botamley and Harrifon.

THIS Matter is stated before in Page 47. and now it came on again upon the same Exception; which was, that the Declaration was too incertain; it only charging the Defendant with finding unam Parcelam segestrium, involucriorum & funium, Anglice of Packcloths, Rappers and Cloths. But upon Argument, the Court was of Opinion, that the Declaration was certain enough. For Parcella in this Case only expresses one certain Thing, and not several Things at large. Where indeed the Declaration expresses several Things at large, they admitted it would not be good. And for Authority, they said Parcella hordei, & Parcella Culmi has been held good. So in the Case of Harford and Jones, 12 Will. seventy two Dunces of Cloves, Mace and Nutmegs has been held good, and yet the certain Quantity of each was not set down. And in the Case of Kempster and Nelson, 1 Geo. 1. the Court went rather farther than in this Case; for that was even in Replevin in the Detinuit; and yet upon solemn Argument they were of Opinion, that two Parcels of Writings, and one Parcel of Childbed-linen, was well enough. So Trover for a Study of Books has been allowed. Accordingly the Judgment in the Common Pleas was affirmed.

Wright and Kenning.

THIS Matter is stated in Page 62. And now upon a second Argument the Court was of Opinion that the Return-day in the Writ of Error could not be amended. For they said, the Statute there mentioned gives this Court only Power to amend Writs of Error, where they have something to amend by; but here they said they have nothing to amend by. Accordingly it was held not to be amendable.

Boot and Graham.

THIS Matter is mentioned in Page 49. And now the Court seemed to be of Opinion, that the Affidavit is necessary. However this Matter did not come fully in Question; but was prevented in a good Measure by an Exception taken by Judge Page, which made it not necessary for the Court to decide the other Question. And this was, that the Demand of Conusance ought to have been entered upon the Roll, before they came to apply to have it allowed. And the whole Court was of Opinion, that this Exception was fatal; for they said, whenever any Thing is suggested in Bar of the Jurisdiction of the Court, it ought to be entered first upon the Roll. And this they said is supposed to be done even in Suggestions, where Prohibitions are moved for; but yet the Chief Justice said, he thought it was another Question, whether they could not allow the Demand of the Conusance to be entered nunc pro tunc; and then that Point fell into Debate. But yet the Court

What shall
not be said
to be a good
Demand of
Conusance.

Court was at last of Opinion, that they ought not to allow it; for Vars to their Jurisdiction ought to be strictly pursued. And this, the Court said, was the Reason, why you cannot make such an Application as this after an Imparllance. There was another Point, that was laid down by Serjeant Hawkins, in this Case; and that was, that the Defendant himself might have pleaded this. But that the Court directly denied, and said it has been determined to the contrary. For the Statute which gives the Chancelloz power to demand this Conusance, makes it necessary for him himself to demand it in this Way. And this is the Reason, why this Case differs from that of Antient Demesne and other Cases of the like Nature. These were the Determinations the Court gave in this Case, and were guided in them by the like Proceedings, which they said were in the Cases of Maners and Fern, and Huit and Fern, which were Cases, where the Chancelloz of Cambridge demanded his Conusance.

Merryfield and Wellen.

How far Bail
shall be re-
quisite in
Writs of Er-
ror quod co-
ram vobis.

THE Plaintiff had obtained Judgment in this Court; and upon the Defendant's bringing a Writ of Error in the Erchequer Chamber, the Judgment was affirmed. After that he brought another Writ of Error quod coram nobis residet; but gave no Bail to it. Upon which the Plaintiff moved now for Leave of the Court to take out Execution. The Court said, that this indeed used to be a Point, that was doubted amongst the Judges, whether Bail was requisite in Writs of Error quod coram nobis. But they could never see any Reason for distinguishing this from other Writs of Error. And, they said, it has been determined lately in the Case of Ginger and Cooper, that there was no Difference. Accordingly, the Court told the Plaintiff, that he might take out Execution without applying to them at all.

The King and The Inhabitants of Benjoe.

How far a
Purchase
shall gain a
Settlement
within the
Statute of
9 Geo. 1.

ON Motion to quash an Order of Session. The Question fell out upon the Statute of 9 Geo. 1. which allows the Purchasing a House or Lands to the Value of 30 l. in any Parish to gain the Party a Settlement in that Parish. Now in this Case, the Purchase Money was only 25 l. but yet the Party had laid out above 100 l. immediately upon it. And upon this the Justices at the Sessions adjudg'd that he gain'd a good Settlement. And now it was moved to quash the Order; because the Counsel said, the original Purchase-Money ought to be at least 30 l. The Court made a Rule to shew Cause.

Tulley

Tulley and Sparks.

THIS Matter is stated in Page 59. And now upon a Rule Nisi it was shewn, that the Condition of the Bond was, if the Heir, Executor, &c. of the Obligor shall pay that Sum, and yet the Plaintiff hath only averred, that the Executor did not pay it; whereas he ought to have said, that neither the Heir nor the Executor did pay it. The Court thought, that this Exception could not be got over; but it was ordered to be spoke to again. There was another Thing, that the Chief Justice said too in this Case; and that was a Reason, which he gave for the Plaintiff's setting out the Condition specially in the Declaration; which was, that if he had declared in the common Way, the Defendant in his Plea of Bankruptcy would have infallibly succeeded; for he would not have prayed Oyer of the Condition; but directly pleaded the Certificate in Bar. Afterwards the Plaintiff thought it best to discontinue, which accordingly they did.

Wyat and Winkworth.

ONE Ralph Bayley was subpoenaed as a Witness to attend a Trial at the Assizes; but did not attend. And a short Time ago the Plaintiff obtained a Rule to shew Cause for an Attachment against him for it; alledging that he was nonsuited at the Trial for want of his Evidence to prove the Hand-writing of Humfrey Wale, a Steward of a Court, and his Predecessor, and that he gave him a Guinea to bear his Charges. And now on Rule to shew Cause he came and set forth to the Court, that it was true he was subpoena'd, and that the Plaintiff told him his Evidence was requisite to prove the Hand of this Wale to an Admission under which the Plaintiff claimed; but at that Time he told the Plaintiff he could do him no Service at the Trial, because he never so much as saw this Wale write, and so desir'd him to excuse his Attendance. He swore farther too, that he sent his Clerk with the Court-Rolls to the Trial, amongst which this Admission was. The first Matter which came in Question here was, whether the Court could grant an Attachment for Witnesses not attending at a Trial? And the Court was of Opinion, that they might. They said too, that they remembred this done in this Court. And the Case of Farnham and Haynes, East. 1 Geo. 2. was cited, where the same Motion was allowed in the Common Pleas. The other Question was, Whether in this Case, they ought to grant it? They were of Opinion likewise that they ought; for they said that there are other ways of proving a Man's Hand, besides seeing him write. And in this very Case, they said he would have sufficiently prov'd Wale's Hand, if he had attended himself at the Trial with the Court-Rolls; but his sending them by his Clerk could signify nothing, so that his not attending was a Contempt of the Court. Accordingly they granted it.

Curser

Curser and others *and* Smith.

THIS Matter is mentioned in Page 59. And now an Affidavit was produc'd, to shew that the Defendant had been arrested by the usual Process of this Court, held at Andover, and that the Gaoler let him escape. Upon which he was again arrested by Virtue of a Latitat, according to the Custom of the Court, and carried to the County Gaol. After which a Habeas Corpus was likewise taken out to command the Gaoler to bring his Body into that Court. But the Gaoler made no Return to it; upon which the Court amerced him twice or thrice, but it was done very moderately, the largest Amerciament being not above 3s. 4d. And now they began to leave off holding a Court at all, though it ought to be holden every Monday. Upon this Complaint the Court began to consider about granting the Mandamus. Judge Reynolds said, that if there was any Collusion between that Court and the Gaoler, he could not see how this Court could well help it. For this Court cannot set the particular Quota of Amerciaments, which the inferiour Court shall assess upon the Gaoler. However the Court thought they might send down a general Mandamus to the Bailiff and Steward to go on in the Proceedings of the Cause; which accordingly they did. And Judge Page said, that he remembered a Case, which he was concerned in, the Name of it was The King and Langton, where the Court granted a Rule to shew Cause, why an Attachment should not go against the Defendant, for not entering up a Judgment of the Court-Leet, as he was Steward and Judge of the Court. And he intimated as if he did not see why an Attachment would not lie in this Case.

Lady Faulconbridge *and* Forrest.

THIS Matter is mentioned in Page 60. And now the Counsel cited the Case of Goodyer and Filpot, Trin. 12 Geo. 1. where this Court made a Rule to shew Cause for changing of a Venue into a County Palatine; though indeed they afterwards discharged it upon the Plaintiff's entering into a Rule to give Evidence in London where he laid his Action. However the Chief Justice said, as this was an Action founded upon the Statute of Scandalum Magnatum, there was no Difference between Peers and Peeres'ses; so that they might bring their Action in Middlesex, let the Cause of it arise any where. This was what the Court seemed to put this Matter upon this Time; though they put it upon another Point before.

Atwood and Elwood.

ISSUE was joined in this Case upon Nul tiel Record. And the Counsel, who pleaded this Plea, had moved the Court a few Days ago, that the other Party might produce the Record before the Court. But they said at that Time that the usual Method of trying Issues of this Nature was to bring the Record before the Master; and it is his Business to examine into it. Where indeed there is any Doubt before the Master it is proper to apply here. Accordingly this Matter did go before the Master; and now he reported, that the Party, who pleaded this Record in Bar, had set forth a great Part of it in hæc verba, but several Parts of it he had set out imperfectly. But yet the Court was of Opinion, that the Record produc'd would warrant the Issue; for they said, that the Party was not obliged to set forth any Part of the Record in hæc verba; and therefore his setting out the Record only in an imperfect Manner could not prejudice him; if indeed there was any Inconsistency in the setting out of the Record, or any Variance between the Record set forth and that produced, the Court admitted it would not warrant the Issue.

When a Plea of Nul tiel Record is pleaded, what the Practice of the Court is concerning verifying of the Record.

When Nul tiel Record is pleaded, how far the Record shall be said to be verified.

The East-India Company and Lopes.

THIS Matter is mentioned before in Page 62. And now as to the first of the Errors there assign'd the Court was of Opinion that it was none. For they said, it was clearly no Error before the Statute for Amendment of the Law; for then the Warrant of Attorney might have been entred up of any Term before Judgment. And they agreed likewise, that this Statute had not made the Want of entering it up Matter of Error, but only gives a Penalty for not doing it. They said farther, that though this Warrant of Attorney was entred up of Easter Term; yet it does not follow but it might be made of Hilary Term. This the Court gave for an Answer to what Mr. Strange said, that the Warrant of Attorney must be intended to be made of that Term it was entred up. Then as to the other Error, the Court was of Opinion, it was well assigned. And now Mr. Reeves desired the Court to affirm the Judgment as to one Part, and reverse it as to the other. For he said here were distinct Judgments given below; the last beginning Et consideratum est etiam, that he shall recover his Costs. To this Purpose he applied the Case of Green and Waller, Trin. 2 Annæ, which was upon a Writ of Error on a Judgment given in the King's Bench in Ireland. There the Judgment below was quod recuperaret his Costs, whereas it ought to have been quod recuperet; but yet the Court affirmed the Judgment as to the other Part, and reversed it as to this. Which they did accordingly in the present Case. 1 Ven. 27.

Watkins and West.

THIS Matter is mentioned in Page 50. And now the Court was of Opinion, that the Plea was bad; and that the virtue ejus could not make it good; for that is only a Conclusion, and therefore will be of no further Service, than the Premises will warrant it. The Case though of Sullivan and Seagrave, which was determined about two Years ago, was cited by the Defendant's Counsel. And that was the Case of a Writ of Error's going out of this Court to Thomas Witcher, Chief Justice of the King's Bench in Ireland; and a Return was made to it sign'd by Thomas Witcher, without his Title of Chief Justice. It was objected there, that it did not appear, that the Person to whom the Writ of Error was directed, and the Person who made a Return to it, were the same Person; but yet the Court held it to be good in that Case. But the Court said, that that Case does not at all warrant this; for there, besides the Name Thomas Witcher, it was further added, *prout interius mihi præcipitur*. Then as to the other Point, which was mentioned last Term in relation to the Demurrer, the Court was of Opinion, that this Defect in the Plea might be taken Advantage of in the Manner that it was; for they said, the Defendants have made no Justification of what they did, as they have not shewn the Bailiffs of the Court and the Borough to be one and the same Persons. Mr. Marsh though said, he would take an Exception to the Declaration, for charging the Defendant with taking *unum Lebetem*, Anglice a brass Kettle, whereas *Lebes* is an antient Latin Word signifying a Kettle only in general, and not a Brass one. But the Court said, as the Latin was good they would then reject the English; and so gave Judgment for the Plaintiff. 2 Lev. 131.

King and his Wife against Jones.

How far a Person shall not be estopped by a Recognizance of Bail.

What shall be said to be a good Plea of Coverture.

THE Plaintiffs brought a Writ of Error *quod coram vobis* upon a Judgment given in an Action between the Defendant Jones and King's Wife, by the Name of Judith Parnel, being her Maiden Name. The Error assigned was, that she was sued by the Name of Judith Parnel, whereas at the Time she appear'd to that Suit her Name was King, and she was under Coverture. The Defendant pleads, that King the Husband is estopp'd from alledging this for Error; because he entered into a Recognizance as Bail for the Defendant in that Action; and consequently did by that Act admit the Suit was rightly brought against her. To which Plea the Plaintiff demurs. Now as to the Plea of the Defendant, the Court was of Opinion, it was clearly bad; for they said, the Substance of the Recognizance only was, that that Person, who was sued in that Action should appear, and not that she should under the same Denomination. But another Question took up greater Consideration in this Case, and that was, whether the Assignment of the Defendant's Coverture is right; in as much as it is only averred, that she was a Feme Covert at the Time she

she appeared; but it does not follow, that she was so at the Time the Action was commenced against her. And the Court said, no Defendant shall have it in her Power to destroy a Plaintiff's Action which is well brought against her. Accordingly the Court affirm'd the Judgment.

Bouton and Hurfler.

THE Defendant libelled in the Spiritual Court for Tithes of Sylva Cædua. The Plaintiff pleaded there, that the Wood demanded was not tithable. And now made a Suggestion to the Court, that they were Timber-Trees, and of 20 Years Growth; and verified it by Affidavit. And now Mr. Lee submitted it to the Court, that this was sufficient, without pleading it in the Court below. He said he relied upon the Authority of 2 Inst. 608. where it is laid down, that when a Libel is in the Spiritual Court for Tithes of Sylva Cædua, and the Defendant suggests, that the Wood is of twenty Years Growth, he may have a Prohibition. He said likewise, that the Court had Authority to grant this Prohibition upon the Face of the Libel; for there the Demand of the Tithes of Wood is set forth generally, and therefore must be intended to be due de communi jure; whereas the Right of Tithes of Wood is only by Custom. And that is the Reason, which is given in the Case of Woods and Hickson, 2 Salk. 655. why a Hundred may prescribe in a Non decimando of Tithes of Wood; for as by Custom it grows due, by Custom it may be made not due. But the Court said, that this Reason indeed was laid down by the Judges of this Court in that Case; but they said, this has never been allowed for Law, by any of the other Judges in Westminster-Hall; and it certainly is not Law; for Tithes is as much due of Sylva Cædua by the Law of England, as any other Tithes whatsoever. And Judge Reynolds said, this may evidently be shewn not to be the Reason of this Law in relation to Hundreds; for if it was, the same Reason would prove that every private Man may prescribe in a Non decimando of this Nature. Then as to the other Point in Relation to the Plea, the Court said, that the Jurisdiction, arising to the Spiritual Court by Matter disclosed in the Libel, cannot be taken from them but by other Matter disclosed in the Plea; and therefore they said, it ought to have been set forth in the Plea, that the Trees were of twenty Years Growth. Accordingly the Prohibition was refused.

How far a Prohibition shall not go to the Spiritual Court without Pleading the Matter below.

How far Tithes of Sylva Cædua is due of common Right.

The King and The Inhabitants of Caywood.

THIS Matter now coming on again, the Court gave their Opinion, that Uleskelf and Ulleskelf were pretty much of the same Pronunciation, and therefore they thought the Order of Appeal good. They said too, that the Court had gone farther than in this Case, for Flixson and Flickson, Barkwaye and Barkways have been held to be the same.

Vide antea 53, 60.

Philipps

Philipps and Davis.

When a Computation of Days is made, how far the last Day shall not be considered as one by Reason that it is no Hall-Day.

TERM began the 21st of this Month, and yet the Defendant put in a Plea of Abatement the 25th, whereas by the Rules of the Court it ought to have been put in within four Days. Upon this Motion was made to set it aside. But the Court said, the 4th Day was Midsummer-Day; and as it was no Hall-Day, of Consequence it could not be put in then. Therefore the Court thought it regular.

The King and Mountague and others.

How far the Court will grant a Mandamus to Justices of Peace.

ON Affidavit, that Application was made to the three Defendants, being Justices of Peace, to put in Execution the Statute of Forcible Detainer, and that they have done nothing in it, tho' it is fifteen Days since, the Court granted a Mandamus to order them to do it.

Masters and De la Ware.

In whose Office Writs are to be filed.

A Motion was made to stay the Proceedings against Bail; because the Return of the Capias ad Satisfaciendum against the Principal was not filed. And a Certificate was produced from M^r. Tulley, that there was no such in his Office. But the Court asked, whether the original Suit was not by Bill; and it being answer'd that it was, they said there must be a Certificate from M^r. Halley as well as M^r. Tulley; because at present there's a Dispute in which of the Offices the Return ought to be filed.

Halls and Thorn.

When an Action is brought by an Assignee of a Bail-Bond, how far the Plaintiff cannot take Exceptions to the Declaration upon a General Demurrer.

THIS was a Writ of Error on a Judgment in the Common Pleas given there by Default in an Action brought by one, as Assignee of a Bail-Bond. The Error assigned by M^r. Reeves was, that there was a Defect in the Declaration, in as much as it appears to be a Bail-Bond, that was given to the Sheriff Edward Person, and yet the Bond itself does not appear to be given to him by the Name of his Office; for the Obligation is only to Edw. Person generally. And first, he said, that it was not a clear Point, whether this Statute of 23 Hen. 6. on which this Bail-Bond was given, was not a General Law, which the Court is bound to take Notice of. And if so, he said it was clear they might take Advantage of this Error, tho' they have not pleaded the Statute. But what he chiefly relied upon, was, that this Action is founded upon the Act for the Amendment of the Law, which is a General Statute, and no Action can be brought by an Assignee of a Bail-Bond upon this Statute, unless the Bail-Bond is a good one; so that now by a mean the Court is bound to take Notice of the first Statute, to see whether this is a Bail-Bond within that Law, or not. To these first of the Points, the Court said, it has often been held, that the Statute of 23 H. 6. is a private Law; and therefore

fore if the second does not help you, it is clear you cannot take Advantage of it. Now as to that, the Court said, that the Words of the Statute for the Amendment of the Law are, that any Plaintiff may take an Assignment of a Bond given to any Sheriff or other Officer for his Appearance; here the Plaintiff has shewn himself to be such Assignee; and consequently he may recover upon it. If indeed the Words of this Statute had been, that any Plaintiff might take an Assignment of a Bail-Bond given to the Sheriff, the Court seemed to think, that there might be a good Deal in the Objection. But as they were not, the Court affirmed the Judgment nisi.

Strangewayes and Selby.

THIS Matter came on now in the Paper, and the Plaintiff moved for Judgment. But Mr. Reeves objected, that the Plaintiff had no Right to amend, till he had paid the Costs, which as yet he had not done; for he had only left the Money last night with the Clerk, which he said was no Tender to the Attorney. This Objection he made, in hopes of hindring the Judgment being given now, and if he could have done that, he would have kept off Judgment the whole Vacation; for this was the last special Paper-day. But the Court said, they would not allow of such a Thing as this; accordingly gave Judgment for the Plaintiff nisi; so that if they do not pay you the Costs before the End of the Term, you will have a Pand over them.

Vide ante 61, 64.

Parker and Stephens.

AN Order was made by the Chief Justice at his Chambers, that Proceedings upon the Bail-Bond should be stayed up, on paying 17 l. into Court. Four Services had been given of this Rule, and yet the Plaintiff would never take the Money. Application was now made to the Court, that the Money may be repaid; for the Counsel said, there must be a reasonable Time, in which the Plaintiff must be bound to take it. Accordingly the Court made a Rule, that the Plaintiff should accept it within a Week.

When Money is brought into Court, how far the Person who has brought it in shall be allowed to have it back again, unless the other Side accepts it within a reasonable Time.

The King and The Bailiff of Scarborough.

ONE Dickenson was brought before the Defendant upon a Complaint, that had been made of him, and the Defendant committed him to Prison upon a General Warrant for contemptuous Words, that he spoke to him, whilst he was before him. Upon which an Information was now moved for. And the Court granted it. For they said, a Magistrate has indeed a Right to bind a Man over to his Good Behaviour, for ill Language given to him; and if the Party cannot find Sureties, then to commit him; but he cannot commit him directly. For which illegal Commitment without any sufficient Reason the Court principally granted it. Judge Probyn said too, that for indecent Expressions spoke of a Magistrate out of his Presence, he has no Right so much as to bind him over to his Good Beha-

How far a Justice of the Peace hath no Authority to commit.

How far a Commitment shall not be said to be good in Point of Form.

How far the Court will grant an Information notwithstanding the Party, who applies for it, has brought a Civil Action upon the same Account.

The Construction relating to Return-days in Writs.

Behaviour. There was a Fault too, which the Court found in the Form of the Commitment itself, because it did not set forth the Reason in particular for which the Party was committed, but was only a General Commitment for several Misdemeanors. And these Forms of Commitments the Court said were illegal; for the Reasons upon which they are made ought to be set forth with so much Certainty, as the Court may judge upon the Face of them, whether they are sufficient or not. There was one Thing tho', which was a good Deal relied upon by the Counsel for the Defendant, that this Dickenson had already commenced an Action in the Common Pleas for this very Injury, that he now complains of; and therefore as he had made his Option, they hoped the Court would not assist in such a summary Prosecution. But the Court said, they have often known Informations granted, where a Civil Suit has been depending at the Time of the Rule made, upon the Party's offering to withdraw it; but in this Case, they said, the Party had done more; for he had already obtain'd a Rule in the Common Pleas for Leave to discontinue, and to be sure that Court would not let him proceed after this.

The King and Gumley.

IT was moved in Arrest of Judgment, that the Trial was had in this Case sooner than the Distringas warranted it. The Reason given was, that the Distringas ordered the Jury to appear die Lunæ prox' post Quinden' Sanctæ Trinitatis, whereas, as it was alledged, the Trial was on the Quindena itself. For it was said, the Quindena Sanctæ Trinitatis is the Monday fortnight after Trinity Sunday; and yet the Trial was on that very Day. Now to prove, that this is the Quindena, the Counsel said, that it was the same, as if the Return-day had been a die Sanctæ Trinitatis in Quindecim dies; and then, it was clear, they said, the dies Sanctæ Trinitatis must be taken exclusive; and consequently the Monday fortnight after is the Quinden'. The Court admitted the Quinden' and the other to be the very same Day of Return; but yet they said, Trinity Sunday must be taken inclusive in the Computation; not indeed, that Propriety of Speech allows of such a Construction; (and that is the Reason, why in Deeds, &c. the a die is always taken exclusive) but because in Returns it has always been understood so; for the Day from which you compute is always taken as Part of the Number. But Mr. Fazakerly objected, that this cannot be understood so in the Return of all Writs, and so the Sunday fortnight be the Quinden'; for if it was an original Writ, then the Return must be void; as it is of a Day on which the Party cannot appear. But Judge Reynolds directly denied that Position to be Law; for he said, wherever the Return-day is of a Sunday or any other Day, which the Party cannot appear on, he ought to appear on the Day after. Mr. Marsh cited too a Case in Show. 60. directly in Point with the Opinion of the Court; and so they adjudged the Trial to have been regular.

Campbel *and* Hoar.

ON Rule to shew Cause why an Attachment should not go. And M^r. Reeves alledged for Cause, both that the Award was void, and likewise, that the Umpire declared at the Time he deliver'd it, that if the Defendant M^r. Alards, who was then in Scotland, should not satisfy the Umpire that the Award was not right when he should come home, the Award should be of no Force. He said M^r. Alards did not satisfy him of it, when he came home; and therefore he hoped the Attachment would not go. The Plaintiff's Counsel took off the first Objection, by saying, that the Defendant was too late to make it; the Stat. 9 & 10 Will. 3. cap. 15. requiring such an Exception to be taken the next Term after the Award is deliver'd; and here was longer Time slipp'd. To the other the Court said, the Dist of the Objection goes to shew, that the Award is void; and therefore what has been said just before over-rules its being taken; however if it had come in proper Time, they said, it would be of dangerous Consequence to admit of such an Exception; for then Awards might be overturn'd by Parol Discourse.

How far the Court will not set aside an Award.

Vide post.

The King *and* Martyn.

ON Rule to shew Cause, why an Information should not be made agreeable to the Affidavits, on which it was granted, the Counsel said, that it was agreeable to them, on which the Rule to shew Cause for the Information was granted; which were the only Affidavits, that they could then Answer; tho' indeed it was not agreeable to some other Affidavits, that were thrown in corroboratory at the Time they came to shew Cause; but they said, as they could not give an Answer to them then, and as it was impossible the Rule for granting the Information could be founded upon them, but only on the first Affidavits, they hoped the Court would not make a Rule for altering it. They farther offer'd to produce an Affidavit, by which it was directly sworn, that the Defendant did not omit entering up any Order of Easter-Term 1723. But the Court said, as you did not at all rely upon the Time when the Rule for the Information was made, and as this was a meer Mistake, they would give Leave for amending it.

Anno 64.

Homes *and* Wood.

IN an Action upon the Case brought by the Plaintiffs for a Sum of Money promis'd to the Wife, in Case she should Cure the Defendant's Wife of a Wound, and provide Plasters for the same; it was moved in Arrest of Judgment, that this Action ought to have been brought by the Husband solely. But M^r. Reeves objected, that this Promise was founded upon a personal Service of the Wife; that therefore this Cause of Action would survive to the Wife; and consequently they both well join'd in bringing it. And so cited an Exchequer-Chamber Case

What Action the Wife cannot join in with her Husband.

2 Cro. 77.

2 Cro. 77. In Point. But the Court said, that Case has been since over-ruled; as *M. Filmer* said it was in the Case of *Buckley and Collier*, 2 Salk. And the Reason, which the Court gave, why the Husband ought to have brought it solely, was, that this Promise should be consider'd as made to him, as the Plasters were to be provided with his Money. They said too, that this Service ought not therefore to be considered barely as personal to the Wife; and consequently the Action would not sur vive; and so arrested the Judgment till it should be moved again.

Robinson, Chamberlain of the City of London, and Webb.

The Privi-
lege relating
to the free
Porters in
London.

THIS was a Matter in Relation to a Custom in the Company of the Free Porters, which has been often debated in Westminster-Hall, and several Times determin'd to be good, as in the Case of *Sir George Rutland and Bradley*, Mich. 3. of the late King, &c. And now this very same Custom was literally returned again. Therefore *M. Strange* said, he hoped the Court would not allow it to be argued again, but grant a *Procedendo* immediately. Which the Court accordingly did.

The King and Strudwicke.

What Prison
a Person shall
be confin'd
to.

THIS was a Writ of Error to reverse an Outlawry; the Error assigned was, that the Defendant was beyond Sea at the Time of the Outlawry pronounced. The Attorney General pleaded *In nullo est erratum*. Upon which the Court reversed it. And then the Defendant desired, that either the Court would be pleased to bail him, or else turn him over from Newgate to the Marshalsea; and in order to induce the Court to do him the last Favour at least, he offered them unquestionable Bail likewise. To the first the Court told him, they could not do it, as he was in Custody upon an *Excommunicato Capiendo*, as well as for several other Offences. To the other they said, he had already escaped out of the Marshalsea upon this Information, and was now in Custody upon an *Escape-Warrant*, and therefore it was against the Rules of the Court to indulge him with being there again. But then, he said, it was not by Force, that he broke the Prison; but only, after he had been brought up from thence to this Court, he went with the Turnkey to a Tavern, and there privately escaped; and this he said, he was compelled to by the dangerous State of Health his long Confinement had reduced him to. The Court told him, they could not enter into the Manner of his Escape, but they were only to consider, that he had escaped. And Judge Reynolds said, that an Act of Parliament has provided, that where a Person escapes from a private Prison, he shall not be allowed to be carried to that Prison again under that Complaint, but shall be confin'd in the County Gaol.

Webster and Guering.

THIS was a Question, that has been long depending, whether the declaring for more, than is contained in the *Ac etiam*, discharges the Bail intirely, or whether, they shall still be liable *pro tanto*. In the Case of Miles and Wourldge the Court indeed was of Opinion, that the declaring, and having Judgment too for more than is contain'd in the *Ac etiam*, does discharge them wholly; but Mr. Strange said, there was a great Deal of Difference, between that Case and this. And he said, the last Time, when this was spoke to, Lord Chief Justice produced a Rule, made in the Case of Wyat and Evans, directly in Point, that the Bail shall be liable *pro tanto*. Mr. Marsh tho' on the other Side cited the Case of Kenybaldo and Cognoni, where Lord Chief Justice Holt was full of Opinion, that the Bail is in such Case discharg'd intirely. The Court seemed to be of Opinion, that the Bail was liable; but upon Mr. Marsh's undertaking to speak to it the first Week in next Term, they enlarged the Rule. Vide 2 Cro. 128 and 630. where it appears, that the having Judgment for more, than is contained in the Writ, is Error. 6 Mod. 266.

How far the Bail shall not be discharged, notwithstanding the Plaintiff declares for more than is contain'd in the *Ac etiam*.

Wilson and Polton.

IN an Action of Trover for certain South-Sea Bonds, this Question fell out upon the Trial, Whether if a Bankrupt's Wife employs another to buy Bonds with the Bankrupt's Money, and he accordingly does so, and delivers them to the Wife, the Assignees under the Commission may come upon the Buyer. Upon which Question the Lord Chief Justice, whom the Cause was tried before, ordered the *Postea* to be stayed. And now the Court seemed to be of Opinion, that the Commissioners could not come upon the Buyer; for they said, if they could, it would be of dangerous Consequence; because he only acts as an Agent or Servant to the other. However it stood over.

When a Wife of a Bankrupt employs a Friend of her's to buy Goods with the Bankrupt's Money, how far the Assignees may come upon the Buyer.

Term. Mich.

2 Geo. II. 1728.

Satcher and The Bail of Cowen.

How far the Court will not stay Proceedings in a Scire facias against Bail upon a Motion.

THE Scire facias was returnable a die Sanctæ Trinitatis in tres Septimanas, and the Sheriff returned, that he had served it. And now Motion was made to the Court to stay the Proceedings upon it. For the Counsel said, that this Return-Day was always of a Sunday, and yet the Notice for Bail's Appearance was given on the Monday, so that it was a Day too late. To the first he cited the Cases of Harvey and Brown, Davis and Salter, which were both determined Trin. 3 Annæ, where this Point was settled, that the Escon-Day was of a Sunday. To the other, he offered to produce an Affidavit. But the Court said, there was a good Remedy by Action for a false Return against the Sheriff, and therefore they would not allow of such a summary Way of examining into the Returns of their Officers. Indeed Judge Reynolds said, where a Sheriff had received Money upon an Execution, and will not pay it over, there they do proceed in an expeditious Way with him; for the Money is supposed to be brought into Court. And some other Cases were cited to the same Purpose. But the Motion was refused.

Jackson and Hall.

How far the Court will not grant an Attachment against a Steward of a Court Baron.

MOTION was made, that the Defendant, who was Steward of a Court Baron, might answer the Matters of an Affidavit, for refusing to admit an Heir at Law to Copyhold Lands, which descended to him. The Affidavit went further too, that a Trial was had for these Lands against the Heir, and that he could not make any Defence for want of his Admission; and therefore he mov'd for a new Trial too. To the first, the Court said the only Relief was in Equity; and to the other, that if the Heir had prov'd himself in by Descent, it would have been enough of it self, and therein he differed from a Purchaser. So refused the Motion.

Tulley and Sparks.

THE Defendant intended to plead Bankruptcy, and therefore he had made a former Motion to have the Commission assigned to him; but the Court said, they could only give him Leave to take Copies of it. And now he mentioned again the Necessity of having the Commission itself; because he was obliged to plead it with a proferret in Cur', and therefore the Plaintiff might demand Oyer of it. But the Court said if Oyer was demanded, they would help him; so made no farther Rule than their former. Another Thing the Court was of Opinion of too, upon a former Argument in this Case, and that was, that the very Petition to my Lord Chancellor for the Commission is necessary to be set forth.

Vide ante
S. C. Page
59, 67.

Vide post
S. C. Page
81.

Ward and Purcel.

THE Defendant was Secretary to the Resident from Venice, but yet was taken in Execution. Accordingly upon Affidavit from the Resident that he was so, and that his Name was entered in the Duke of Newcastle's Office, though it was not transmitted over to the Sheriff of Middlesex at the Time he was arrested, but a few Days after, and upon Affidavit that he offered to shew his Testimonial to the Officer, and that he really exercised the Office, the Court discharged him, Notice being given of the Motion.

How far a
Servant of
an Ambassa-
dor shall not
be subject to
an Arrest.

The King and Johnson.

THE Defendant was indicted for High Treason in counterfeiting the King's Coin, and outlawed in February last, and having obtained a Habeas Corpus was now brought up upon it, and would have assigned for Error to reverse the Outlawry his being out of the Realm at that Time. But the Outlawry was not before the Court, and therefore they said, they could do nothing in it. The Reason why it was not, the Attorney General said, was, because it could not yet be drawn up and laid before him, but in a few Days it should be done. Then the Prisoner said, that he did now surrender himself into the Hands of the Chief Justice, in Pursuance of the Statute of 5 & 6 Ed. 6. 11. and was ready to traverse the Indictment, and prayed that his Render might be recorded. But the Attorney General opposed that, for when the Outlawry was ready, he said, he should offer some Reasons to shew, that the Prisoner was not within the Benefit of that Act. The Court then said, that they could not allow of such an Entry to be made, that he did surrender himself, for that would be to admit his Render to be good, which was in Dispute. However the Court did allow of an Entry to be made in this Form. Memorandum, The Prisoner being brought up by the Keeper of Newgate charged with an Indictment of High Treason, and alleging that he was outlawed for the same, and that he was beyond the Sea at the Time of the Outlawry, has offered to surrender himself up

What relates
to Outlawry
in Case of
High Treason.

Vide post
S. C.

to the Chief Justice and to traverse the Indictment. And then he was remanded back.

Prior and Prior.

How far the Court will set aside a Judgment by Reason of its being signed notwithstanding a Judge's Summons.

THE Rules for pleading were out, and the next Day the Plaintiff told the Defendant he would sign his Judgment on the Morrow, if he would not put in his Plea. The Defendant being afraid the Plaintiff would do it, took out a Summons from a Judge to shew Cause, why he should not have four or five Days longer. But the Plaintiff being resolved the other should not have his End, upon receiving the Summons sign'd his Judgment. And now on Motion the Court thought it should be set aside; for they said, it was true a Judge's Summons said nothing; but yet the Signing the Judgment in this Manner was plainly a Snap, and therefore refer'd it to the Master.

Ward and Purcel.

What Persons shall be allowed the Privilege of an Ambassador's Servant.

MOTION was now made to discharge that Rule, that was made before for setting aside the Defendant's Execution; because, it was said, he was a Half-pay Officer, and did not reside in the Ambassador's House, and so was not a Domestick within the Statute of 7 Annæ 12. But the Court said that the Nature of his Office shewed him to be a Domestick, and living in the House with an Ambassador is not requisite. Indeed they said, where a Person does not execute the Office, which he has his Testimonial for, but only gets himself enter'd in the List to have the Benefit of a Protection, they will not suffer it. And this, the Counsel said, was the Case some Time ago of the Morroco Ambassador.

The King and Wake

What Persons have authority to administer the Oath of Office to the Members of a Corporation.

When Notice is given of a meeting in a Corporation for particular Business, how far other Business cannot be gone upon.

ON Rule to shew Cause, why Informations in the Nature of Quo Warranto should not be filed against the Defendants for exercising several Offices in the Borough of Southwold in Suffolk, several Points of Consequence fell into Debate; and therefore the Court said, they would not determine them upon Motion, but would grant the Informations, that they might come before them in a more proper Way. One of the Points was, in Case a Charter is silent as to the Person, who shall administer the Oath of Office of Burgessees, whom does the Law appoint to administer it? Judge Reynolds said, his Opinion was, that none could do it, but by Dedimus from the Chancellor. And that, he said, was the Case of the Devises. Another Point was, in Case a Charter appoints nothing about an Oath of Office, whether any such Oath can be administered at all. And to this no Opinion was given. Then some Difficulties fell into Debate about Notice. And one Rule the Chief Justice laid down, that wherever Notice is given for one particular Business only, the Body cannot go on to other Business, unless the whole Body is met, and it is done by Consent.

Tulley

Tulley and Sparks.

THE Defendant not being able to get Copies of the Proceedings in the Commission of Bankruptcy, upon account of the Rules not being drawn up right; the Court ordered it to be drawn up in this Manner, That the Defendant should have Liberty to take Copies at his own Expence of all the Proceedings upon the Commission of Bankruptcy, that were in the Plaintiff's Hands. The Counsel seemed to make some Doubt too, whether the Bond given to the Chancelloz must not be set forth in the Pleading as well as the Petition. But the Court said, that is never given in Evidence upon an Issue of Bankruptcy, and consequently there can be no Occasion to set it forth in the Pleading.

Vide ante
S. C. 59, 67,
79.

How far the Court will give Liberty that a Person shall inspect Proceedings under a Commission of Bankruptcy.

Vide post S. C.

The King and The Borough of Plymouth.

THE Defendants had omitted to choose a Mayor on the Charter-Day or the Day after, and thereupon this Court had a Right to send down a Writ of Mandamus to this Borough, in Pursuance of an Act made in the late King's Time, to require them to go to the Choice of a Mayor. And now the Question was, how the Writ should be directed? For on Rule to shew Cause, why it should not be directed to those that have a Right to elect, the Counsel objected, that it ought to be sent to the Mayor, &c. according to their Name of Corporation. But it was answered on the other Side, that that would be a wrong Direction, because in Default of their going on to an Election the last Charter-Day, there was no Mayor at all. The Court said, let it be drawn up wrong or right, it is at their Peril for having it drawn up so, and therefore they would not concern themselves in it. And Judge Page said, that in Brocas's Case of the City of London, where such a Motion as this was made, the Court would not go into it; if the Direction should be wrong, they declared they would quash it. But however Mr. Reeves produced the Act of Parliament, by which the Court said it appeared this was the proper Direction. And then they appointed the Day on which the Election should be, and the Person to give Notice of it in Pursuance of the Act.

When a Mandamus is to go to a Corporation, requiring them to proceed to the Election of a Mayor, in pursuance of the Statute of ——— how the Mandamus is to be directed.

Wilcox and Litchey ver. Pokinhorn.

Serjeant Belfield mov'd, that the late Sheriff of Cornwall might deliver over to the present Sheriff the Goods, which he had returned he had taken upon a Fieri facias, but could not sell pro defectu emptorum. For he said, the Right of selling them determin'd with his Office, and therefore the Writ of Venditioni exponas must be directed to the present Sheriff. And this is held in Yel. 44. But the Court said, that that Case is reported to the contrary in 2 Cro. 73. And so this Point has been lately settled in the Case of Clark and Wythers in Salk. Therefore they were of Opinion the Writ of Distringas nuper Vicecomitem should be directed to the present Sheriff; so refused the Motion.

When a Sheriff takes Goods in Execution, how far he has a Right to sell them notwithstanding his Office be determined.

The King and Long.

What shall
not be taken
to be a Re-
turn to a
Mandamus.

How far the
Court will
grant an At-
tachment for
an improper
Return to a
Mandamus.

A Mandamus had been granted by the Court against the Defendants, who were three Justices of Peace, to put in Execution the Statute of Forcible Entry. And now by way of a Return to it they sent up an Inquisition taken before a Jury, which they had caused to be impanelled, who find that the Parties complained of for the Entry extratenuerunt possessionem & adhuc extratenuent, which is only an Indictment for a Forcible Entry. They annexed to the Writ of Mandamus a Certiorari too, and two Recognizances. The Counsel said, that this Return was no kind of Obedience to the Writ; for the Writ commanded the Defendants to clear the Possession of the Wrongdoers, and put the lawful Owners into it; whereas they have only procured them to be indicted; and therefore for this plain Contempt of the King's Writ he hop'd the Court would grant an Attachment against them. He said too, that there was a Case in 7 Geo. 1. which was The King and The Justices of Dorchester, where a Mandamus went to order the Justices to sign a Poor's Rate; the Justices made a general Hushing Return, that the Rate was not made secundum Actum Parliamenti; and in that Case the Court granted an Attachment. Mr. Hufsey said, that he was Counsel in that Case, and it was granted upon the present Lord Chief Baron's Motion. But the Court said, if it was granted in that Case, they believed it was the first in which it ever was. But however here they said, they could not take this to be any Return to their Writ; for the Certiorari is enough of itself to bring the Indictment up, and therefore they would suppose it came up upon that; and accordingly made a Rule upon the Defendants to make a Return to it.

The King and The Borough of Liverpool.

In what
manner
Rules are
proper to be
drawn up
which are
made for the
granting
Mandamul-
ses to Corpo-
rations.

THE Attorney General came and produc'd the Charter of this Corporation, by which it appeared, that they were to choose Under-Bailiffs, who were in the Nature of Race-Bearers, on St. Luke's Day every Year. He produced Affidavits too, that these Officers usually had executed the Processes of the Court in this Borough. He said too, that there was a By-Law, that on the first Wednesday in every Month a Common Council should meet, which by the Constitution consists of the Mayor, Bailiffs and a select Number of the Commonalty, to settle the Business of the Corporation. Notwithstanding this, a Common Council has not met for these two Years last past; by which Means many Leases have run out unrenewed, no Under-Bailiffs had been chosen all this Time, and much Business of the Corporation wanted to be done. For which Reasons he applied to the Court for a Mandamus to be directed to the Mayor, Bailiffs and Commonalty of this Borough, to meet in Common Council accordingly, and to perform the Business of the Corporation according to their Duty. He said further, that he had in his Hand a Rule, which was made Mich.

10 Geo. 1.

10 Geo. 1. whereby the Court ordered a Mandamus to issue, in as general Terms as those he prayed for in, to the Mayor and Aldermen of the Borough of Kingston upon Hull. The Rule was, that a Mandamus should go to order them ad agendum necessaria Negotia Villæ prædictæ. But the Court said, that they never knew a Mandamus go to require a Corporation to assemble themselves, unless there were shewn to the Court some Matters necessary to be done in the Corporation relating to the Publick. Now they said indeed, Officers to execute Processes of the Court were certainly Ministers of Justice, and therefore if such Persons were wanting to be chosen, it would be very proper for this Court to interfere. But the Nature of these Offices, they said, was to be determined by the Charter that created them. And as it stands upon that, it appears that they were only to attend the Person of the Mayor, without any Ways being interested in the Concern of the Publick. Then as to the Renewal of the Leases, they were Matters of private Property, in no Ways fit to require this summary Interposition of the Authority of this Court. Judge Reynolds repeated it twice too, that if it stood barely upon the Foot of the By-Law, he thought a Mandamus would never lie to enforce it. He said farther, admitting these Officers to be Ministers of Justice, he thought it would be a very strange Thing for this Court to order the Corporation to chuse them now, when there is a Day certain appointed by the Charter for the Choice of them. Then as to the Rule produced, the Chief Justice said, he remembered the Court at that Time saying it was drawn up wrong, and upon that account superseding the Mandamus that issued upon it. However upon the Attorney General's desiring to look a little farther for Rules that have been drawn up of this Nature, the Court made one to shew Cause. And afterwards Affidavit was made, that the Defendants had held a Court in Pursuance of the Rule; so the Court discharged it, and said, they need not return the Mandamus.

How far a Mandamus shall not be granted requiring Persons to proceed to the Election of Officers, by Reason that those Officers do not relate to the Administration of publick Justice.

Anonymus.

A Motion was made to set aside a Judgment, upon Account of the Plaintiff's dying before the Signing it. But it appearing to be entered up as of the Term in which he was living, the Court said that was what was material, and it did not signify when it was signed. And this, Judge Reynolds said, was the common Case of a Man's giving another a Letter of Attorney to enter up Judgment against him of such a Term, and dying the Vacation after; where it is frequent to enter up the Judgment afterwards as of the Term before he died. Accordingly the Court held it to be regular.

How far the Court will not set aside a Judgment by reason of its being signed after the Death of the Plaintiff.

Fullness and Baker.

THIS was a Writ of Error in an Ejectment; in which Case the Statute of 16 & 17 Car. 2. cap. 8. requires, that the Defendant in the original Action, who would stay Execution by such Writ, shall be bound in a Recognizance of such reasonable

Sum
When a Writ of Error is brought upon a Judgment in an Ejectment,

and the Defendant enters into a Recognizance, how far he shall not be required to justify.

Sum as the Court shall think proper. The Counsel said, the usual Recognisance in such Case is of two Years Value of the Land in Question, and in that Sum the Defendant was bound. But yet the other Side would have had him justified. Now the Court said, there was no Reason for that; for the Statute appoints, that his Recognisance shall be taken, and therefore whether he can justify or not, cannot be material. Indeed the Chief Justice said, it was a Question one Time, whether he must not have two Bail to join with him; but it has been determined, that the Party's own Recognisance is sufficient upon the Words of the Act. So they would not make him justify.

Blackborn qui tam and Daniel.

Vide ante
S. C.

MR. Reeves now moved on the Part of Hall, who was complain'd of before. And he said he did not do any Thing for the Plaintiff after the Defendant employed him; and as to his not taking due Care of the Cause, he said, the Defendant first employed one Collins, who died, and then when Hall began to be employed he writ to Collins's Agent to inquire about the State of the Cause, and he sent him Word, that the Defendant had pleaded, and when the Prosecutor should proceed any farther in the Cause he would send him Word of it. Upon which the Court said, that they thought this a sufficient Excuse to clear him of an Attachment.

Smith and Bear.

Who is the
proper Per-
son to be con-
sidered as
Attorney in
a Cause.

ONE Crosby, who was Attorney for the Defendant, gave Notice to the Plaintiff, that he would file common Bail. But not being an Attorney of this Court, filed it in the Name of one Stokes. The Plaintiff's Attorney however looked out for Stokes, and served him with the Declaration, which the Court said was irregular; for he ought to have served Crosby. Accordingly upon the Master's Report set aside the Judgment.

Anonymus.

How far Ar-
ticles of the
Peace shall
not be dis-
charged.

ON Motion to discharge a Person of Articles of the Peace upon Account of his being convicted upon an Indictment of Battery for the Offence, which was the Foundation of them, the Court refused to do it. For they said, the Indictment was to punish him for what he had done, and the Articles were to prevent him from doing something worse. They said too, that the Conviction upon the Indictment was a farther Argument of the Necessity of the Articles.

How far an
Award shall
not be said
to be good by
Reason of its
not making
an End of all
the Matters
contained in
the Submis-
sion.

Philipps and Knightley.

THIS was an Action of Debt upon an Arbitration Bond. The Defendant pleaded no Award made. The Plaintiff replied and set forth the Submission to have been of all Matters in Difference between the Parties; that in Pursuance of that the Arbitrators awarded, that one Marshall on whose Be-
half

half the Submission was made, Defendant, should covenant to indemnify the Plaintiff against all future Costs attending an Action that he had against him in the Common Pleas on Behalf of himself and the Poor of the Parish of ; and that they Two with this Marshall (who was not Party to the Award, but interested in it) should meet at a certain Place on a certain Day, between the Hours of Ten and Twelve, and that Marshall should pay the Plaintiff 28 l. The Plaintiff avers, that the Defendant and he met between the Hours aforesaid, and continued at the Place appointed, but says, that Marshall did not come, nor any for him, for which he brings this Action. Upon which the Defendant demurs. And now his Counsel took two Exceptions to the Replication. The one was, that the Award was not in Pursuance of the Submission; for the Submission is, that the Arbitrators shall make an End of all Matters in Difference; whereas it appears by the Award, that there was a Suit depending at the Time, and the Arbitrators have not put an End to it, but only ordered, that Marshall should give a Bond of Indemnity to the Plaintiff not to go on with it; whereas they should have ordered, that Marshall should have discontinued his Suit, or done something of that Nature. The other was, that the Breach is not well assign'd; for the Plaintiff only says, that the Defendant and he met between the Hours of Ten and Twelve, and continued there, but it does not appear, that they were there all the Time; so that Marshall might have been there notwithstanding. To the first Exception, it was answered on the other Side, that a Court of Equity would make Marshall put a Stop to his Suit upon this Award. And to this Purpose was cited the Case of Beckett and Taylor, 1 Mod. 9. To the other it was said, that it shall be intended he continued there all the Time, unless the contrary appears; and therefore if it was otherwise, the Defendant should have shewn it in his Rejoinder. However the Counsel said, whether this Breach was well assigned or not, was but Surplusage; for the Defendant's Pleading no Award made, admits a Performance in no Part of it; and therefore when the Plaintiff shews forth an Award, he need not say any Thing farther. Especially too, he said, this could not be taken Advantage of upon a general Demurrer since the Statute for the Amendment of the Law. The Chief Justice said, that he only intended this speaking to the Case to be to open the Difficulty of it, and therefore he should only give his Opinion in general, that he thought both the Exceptions would go pretty hard with the Plaintiff. And as to the last Thing mentioned, he said, the Principle the Counsel went upon was not Law. Vide post S. C.

More and Jones.

THIS Case was now more largely spoke to than it was upon the former Argument. There was nothing that was said by the Court then, but what they agreed in now; but yet some new Matter was resolved by them. The Chief was, whether the Defendant's demanding Oyer of this Writing, and its appearing upon the Oyer, to have been enter'd, sign'd, seal'd and deliver'd

ver'd in the Presence of such Witnesses, had not cured the Defect in the Declaration. For this Purpose the Plaintiff's Counsel cited the Case of an Action brought upon a Bail-bond by a Sheriff, and the Plaintiff's not shewing in his Declaration, that the Bail-bond was given to him in the Name of his Office; in which Case if nothing farther appear'd, the Bail-bond would certainly be void; yet when the Defendant demands Oyer, and by the Sight of the Bond it appears it was given to him in the Name of his Office, it has been held to be good enough. A Case to the like Purpose was cited out of 1 Cro. 209. In the same Manner it was said of Letters Patent, they may be set out wrong in Pleading, but yet the Profer in Curiam helps them. These Cases the Court admitted, but yet they said, they do not come up to the Case in Question; for by the Oyer a Writing is only set forth, which has these Words in it, signed, sealed and delivered, but it does not appear that that was ever done but in the Cases cited, by the producing the Instrument the Thing it self appears to have been done. And as to the Case in Croke, the Defendant admits it by his Plea. So in our Case Judge Reynolds said, if the Defendant had pray'd Auditum Facti in Narratione mentionat', he did not know, but that Case might have come up to Croke's. However, besides this Matter about the Oyer, a good Deal of Stress was laid by the Plaintiff's Counsel upon the Word *convenit*, in order to shew, that that was a technical Word as well as *Factum*, and of Consequence carried with it an Implication of there being all Circumstances complied with necessary to found an Action of Covenant upon. To this Purpose he cited the Case of *Atkinson and Coteshworth*, Pas. 8. of the late King. where the Plaintiff had charged in the Declaration, that the Defendant per scriptum obligatorium *convenit* to do such and such Acts. In that Case, it was argued, whether the Declaration was good or not. It was held, that it was good; there some of the Judges put it upon the Words *Scriptum obligatorium* being technical, and others of them upon the Word *convenit* being so. The Court said, they paid a great Regard to the Opinions of those Judges; but yet they could not see, how *convenit* could carry with it those Circumstances; for if it could, then *convenit* would do alone of it self, which never was heard of. It was hinted at farther by the Counsel, as if this Form was usual to declare in, in the Common Pleas. The Chief Justice said, if that could be made out, it would be very hard, that this Court's declaring in another Way should overturn the Precedents in that Court; but that he did not think that that could be the Way of declaring in that Court. So for these Reasons the Judgment below was reversed.

The King and Weston and Westley.

Vide ante 56.
S. C.

AN Information of Perjury was applied for against the Defendants last Term, for voting for Knights of the Shire of the County of Dorset, and swearing that they had a sufficient Freehold in Pool in that County; whereas Pool is a Town and County of it self, out of the County of Dorset. The Court said at that Time, that if the Counsel thought proper, they might apply to the Assizes, but this Court would not concern themselves

selves in it. The Grand Jury there returned Ignoramus upon their Bill of Indictment; and therefore the Counsel came again and applied for the Information; but the Court refused it; for they thought it would be strange, that a Man should be punish'd for Perjury, for being mistaken in a Point of Judgment; and therefore they thought the Grand Jury did right. Then the Counsel said, they did not know, how they could prevent these Things for the Future. But, the Court said, the Sheriff ought not to allow of their Notes, and that that was the proper Method to be taken.

The King *and* Roo and Glanvil.

Serjeant Belfield moved for an Information against the Defendants, for making one Alden drunk, and then drawing him in to sign a Note for 20l. But the Court said, they would not let a Matter of Civil Right be influenced by an Information of a criminal Nature. They said indeed, that where a Man takes a Bond or Note out of another Person's Hand, which that Person has a Demand upon him for, and tears it, the Court will grant an Information against him.

How far the Court will not grant an Information against a Man for obtaining a Note from another unduly.

Sir Thomas Eveskyn *and* Merry.

THIS was a Writ of Error upon a Judgment in the Common Pleas; and now several Exceptions were taken to the Declaration. First, it was, that this was an Action founded upon a Bill of Exchange, and therefore the Bill of Exchange ought to have been laid to have been made according to the Custom of Merchants. Another Exception was taken for its not being said, to be signed by the Party, that drew it. A Third was, for its not being said to be accepted in Writing by the Defendant, whereas by the Stat. of 9 & 10 Will. 3. c. 17. this is necessary. The last was, that it was not laid to be made for Value received; for it is only said in the Declaration, *pro valore in manibus accommodato de denariis Querentis*. The second Exception chiefly stuck with the Court. For as to the first they said, it has been held often, that the general Customs of Merchants they are obliged to take Notice of; and therefore they are bound as Judges to know, whether this Bill of Exchange is within that Custom. As to the Third, they said, that indeed the Statute of William required the Acceptance to be in Writing, where a Person would take Benefit of that Act; but it does not require in general, that the Acceptance shall be by under-writing. As to the last they said, that Value received is not necessary to be laid in the Declaration, and therefore they would strike out that Clause *pro valore*, &c. as Surplusage. But to the second Exception, the Court seemed to think, there was a little more Difficulty in it; for they admitted, that *fecit notam* would not be good in an Action upon a promissory Note; and then the Question was, how *fecit Billam* could? But the Court seemed to think, that a Signing is necessary to be laid in an Action upon a promissory Note to bring the Plaintiff within the Benefit of the Statute of 3 Ann. c. 9. which requires it. But they doubted, whether a Bill of Exchange shall not be considered

What shall be a good Declaration of a Bill of Exchange.

See a very different Rep. of this Case in 2 L. Rep. 1642. Where the question is accepting to insert such as "value received" in Bill of Exchange is said to be a very different question.

der'd as a technical Word, and consequently will include the Circumstances of Signing. The Court said in the Argument of this Case at another Day, that there was no Occasion for Value received to be in the Bill of Exchange itself, so affirm'd the Judgment.

The King and Hales.

How far
Trials at Bar
shall be
granted in
criminal
Cases.

THE Defendant was indicted for forging an Indorsement of a Note of 800 l. which Indictment was preferred against him at Hicks's Hall, and was afterwards removed up by Certiorari into this Court; and now the Attorney General moved, that it might be tried at the Bar next Term. He said, this was not indeed a Prosecution carried on by the Direction of the Crown, but only supported upon the Expence of a private Person. However he mentioned two Cases, where the Court had granted the like Motion with this, upon the Application of the King's Attorney. One was the Case of the King and Ward; the other the Case of the King and Johnston. The Attorney General said too, that strictly this Matter cannot be tried at theittings without his Leave; for every Writ of Nisi prius in criminal Cases must be signed by him, to have his Consent. But the Court said, if the Attorney had made this Motion in Right of his Office at the Instance of the Crown, it was certainly demandable of Right, tho' the Trial was moved to be had in an issuable Term. But here the Attorney moves only as Counsel, and therefore he can only apply to the Court upon the ordinary Circumstances, which these Motions are granted on, which are the Length or Difficulty of the Case. And here, they said, nothing of this was pretended. The Chief Justice said, he remembered very well the Rule for granting the Trial at Bar in that Case of the King and Johnston was founded upon the Length of Examination, that would be requir'd in that Case. And as to the Case of the King and Ward, that Prosecution was carried on by the Direction of the House of Lords, which might Influence the Court to have had the Trial at the Bar. And as to what the Attorney said, about the Writs of Nisi prius being signed by him, the Court said, he may very well refuse it in Prosecutions at the Instance of the Crown; but it is never done in Prosecutions of this Nature, which are considered as the Suits of private People, tho' the King's Name is made use of. Judge Probyn tho' said, that this was a Forgery of a Note of Hand, and concerned publick Credit in general, and therefore he did not know but the Consequence of this Case might make it something distinguishable from others. However the Motion was afterwards granted upon the Attorney's saying, that he had since got the King's Command to carry on this Prosecution.

Wills and Hern.

How far the
taking an Af-
firmment of a
Bail-Bond is
a Person's
only Re-
medy.

ONE King was Bail for the Defendant, and when he came to give his Bail at a Judge's Chamber, he altered the Plaintiff's Christian Name, and changed it to Thomas. Now the Court said, this was no Bail to that Action, and therefore set aside

aside the Judgment, upon Account of the Defendant's having never appeared. They said, that the Plaintiff ought to have look'd on the Bail at the Time it was given in; and that now the only Remedy was to take an Assignment of the Bail-Bond.

The King and Baker and others.

THE Counsel came to shew Cause upon a Rule, that was made in this Case. But first Mr. Fazakerly made an Objection against the Affidavits, on which the Rule was made, that they were titled in a Cause of Holdfast and Baker, whereas the Facts in those Affidavits cannot any Ways affect that Cause; and if they should think proper to indict the Persons that made them for Perjury, they could only indict them for Perjury in a Motion for a Rule to obtain an Information, and as the Affidavits were titled in a particular Cause, they could not produce them on such an Indictment. But the Court said, that at the Time those Affidavits were made there was such a Cause depending, as Holdfast and Baker, and these Affidavits concerned it. For they charge the Defendants with conspiring to raise up and suborn Evidence against the Plaintiff. For which Reason the Court ordered the Counsel to proceed. And now upon Reading many Affidavits the Case appeared to be, that this Turner, who is mention'd before, with one Quinn, had enter'd into a Contrivance with Two more to set up a sham Story about Turner's Marriage in order to get Money out of the Defendants, by persuading them that by the Discovery they might obtain a new Trial and set aside the former Verdict. Turner and Quinn finding at last, that they could not have their Ends of getting Money out of the Defendants, turned Sides now with an Appearance of serving the Plaintiffs, in Hopes that by this other sham Story about the Conspiracy they might amuse the Plaintiffs, and get something out of them. But in that they could not succeed neither. However the Counsel for the Rule said, that though it should be discharged as to Baker and several of the other Defendants, yet they hoped it would be made absolute as to those Two, who joined themselves with Quinn and Turner in the first Contrivance. But the Court said, they would not grant the Information against them neither, for they would never let them be punished, and their two Confederates go acquitted. And if cross Informations should go, then only his Evidence could be allowed of, whose Information should happen to be first tried. Therefore the Court thought, that the proper Way was to apply for an Indictment to the Grand Jury.

Farthing and Wright.

IN this Case the Writ of Error upon a Judgment in the Common Pleas was returnable two Terms before the Judgment given. Upon which the Plaintiff moved, that his Writ might be amended. But the Court said, they thought they ought to quash it with Costs; which they accordingly did.

How far a
Writ of Er-
ror shall be
quashed with
Costs.

Lamb and Rofs.

The Course
of Proceed-
ings against
an Attorney.

THE Defendant was an Attorney of this Court, and lived 100 Miles off; the Plaintiff filed a Bill against him, and sent it him down, and at the same Time serv'd him with a four Days Rule to plead; now the Counsel said, that it was impossible for him to plead within that Time, and yet the Plaintiff immediately after the Time signed Judgment. The Defendant ordered his Agent to plead the General Issue for him as soon as possibly he could; and therefore the Counsel moved, that this Judgment might be set aside. But the Court said, the Judgment was regular, and therefore they could not do it. And Judge Page said, that Attornies of this Court are always here by themselves or their Agents.

The King and Roberts.

How far the
Court will
not grant an
Information
for a Libel.

MR. Lee moved for an Information against the Defendant, for publishing a very great Reflection upon the African Company in one of the News Papers, by charging them with having supported their Trade by Treachery and Fraud. But as this was only a Dispute about a Matter of Trade, the Court thought it would be sufficient to apply to the Grand Jury.

The King and Johnson.

Vide ante
S. C. 79.

THE Attorney General moved for Judgment against the Defendant, who was Outlawed for High Treason at Hicks's Hall upon an Indictment, that was there found against him, for diminishing and gulling over the current Coin of the Kingdom. The Defendant being demanded what he had to say, why Judgment should not be pronounced against him, desired, that a Plea which he produced might be read, which was done accordingly. The Substance of it was, that he surrendered himself into the Hands of the Chief Justice, that he was at Flushing in Holland at the Time the Outlawry was pronounced, (which was in February last) and then traversed the Charge in the Indictment. Upon which the Attorney said, that as this was a new Case, he should at present only desire a Copy of the Plea. Upon which the Prisoner prayed, that he might have a Copy of the Indictment and Counsel assigned him. But the Court told him, that that he could not have; for he was not within the Statute of 7 W. 3. 3. which gives this Privilege only in such Treasons, whereby there is a Corruption of Blood. But as to his having Counsel to every Point, concerning the Outlawry, the Court told him, he was intitled to it of Right; for that is a Matter collateral to the principal Charge.

Vide post 91.

The King *and* The Inhabitants of Benjoe.Vide ante
S. C. 66.

ON Rule to shew Cause, why an Order of Sessions should not be quash'd, the Case appeared to be, that a Man had purchased an Acre of Ground within this Parish, which he paid 25 l. for, and then built a House upon it, which he lived in for nine Months, and afterwards sold the whole for 50 l. Upon which the Justices at the Sessions adjudged, that by this Purchase he gained a Settlement within the Statute of 9 Geo. 1. And now for Cause Mr. Reeves shewed, that though that Statute only provided, that whoever should pay 30 l. for the Purchase of Land in any Parish should gain a Settlement by it; yet such a Purchase as in the Case in Question was within the Reason of that Act. For it was more probable, that a Person who could give 25 l. for a Piece of Ground, and lay out so much Money upon it as he did, would not be a Charge to that Parish, than a Person, who could afford barely to give 30 l. for such a Purchase. And these Acts relating to the Poor were, he said, to be taken by Equity; and for this purpose cited a Case upon the Stat. of 3, 4 W. & M. 11. where it was held that the Service of an unmarried Person, having Children that were grown up and got a Settlement elsewhere, was within the Equity of that Statute. So, he said, upon that Statute it was held too, that if a Person was in Possession of a Freehold or Copyhold, or even a Leasehold Estate, he need not give Notice to gain him a Settlement. However the Court seemed pretty clear in their Opinions, that such a Purchase as in the present Case, was not within the Benefit of the Statute of 9 Geo. 1. because it by no Means complied with the Terms of it. And they were not to consider whether such a Person as this, was so likely to become chargeable as the other; for that would lead them into a wild Enquiry. However Judge Probyn said, that he did not know, whether this Case might not fall within the Statute of 13 & 14 Car. 2. The Court were in some Doubt as to this last Point, so it stood over.

How far a
Purchaser
shall gain a
Settlement
within 9 Geo.
1.The King *and* Johnson.Vide ante
79, 90.

THE Court now said, that there was a Mistake in the Prisoner's Plea, for upon the Face of it it appears to be a Plea as of Wednesday last, whereas the Outlawry was not brought into Court till the Saturday following. They said, they mentioned it to prevent any Surprise or Difficulty that the Prisoner might otherwise fall into. Upon which the Defendant's Counsel said, that if the Attorney General pleased, he might waive this Matter as to the Outlawry, and go on wholly upon the Indictment. And they said, that this same Thing was done in the Case of the Regicides. But the Attorney General said, that

that in that Case the then Attorney General had Orders from the Crown to consent; and without them he did not think he had Authority to consent. So the Court seemed to think, that that was a Matter much to be questioned. However the Attorney said, that he was willing all Matters should be taken out of the way, that might any Ways entangle this; and therefore he would now lay that Question aside in relation to the Surrender, and readily own that this was not so strong as Sir Thomas Armstrong's Case. and therefore that the Surrender was good. For in that Case the Defendant was taken up upon the Outlawry itself, whereas in our Case he was taken into Custody upon an Escape-Warrant. And of this Opinion was the Court. Yet he said, that in these Proceedings of the Defendant about his Defence there was great Inconcreteness, and therefore he would mention them now, that they might be put into a better Manner, so as not to be made a Precedent of. He said, the putting in a Plea and Suggestion both, was wrong; for the Prisoner must certainly stick to one; and then he doubted, whether a Suggestion could be entered upon the Roll, without the Leave of the Court. He said too, that the Traverse to the Indictment was put in too soon, for the Defendant as yet has not been arraigned upon it, and therefore he could take no Issue upon it. Which Point the Chief Justice affirmed too. For these Reasons the Court thought it advisable, that the Counsel should take their Plea back, and plead *ore tenus*; and they said, they should make no Scruple in giving such an Order; for if the Attorney had demurred to it on these Objections, they should have given Leave to have had it amended.

Vide post
S. C. 93.

Nayler and Scot.

THE Motion for a Prohibition, that was made before in this Case, was upon the Foot of the Libel, and now Mr. Reeves came to shew Cause upon a Rule that was then made. But Mr. Fazacherly said, that since that Time they had pleaded below, and denied the Custom; notwithstanding which the Plaintiff was there going on; now he said, if the first Matter should go against them, they should move upon this other Footing; and therefore it would a good deal shorten the Business, if the Suggestion was amended by Consent, and made according as he has opened it now. Upon which it was amended by Consent.

Vide post
S. C.

Davie and Davie.

Serjeant Darnel came to shew Cause the other Day on a Rule that was enlarged in this Matter; and the Cause, that he then shewed, was, that the Person, whom they arrested was one Davis, and not Davie, and therefore he hoped the Rule would be discharged. Upon which Mr. Strange desired further Time to clear this Matter. But the Serjeant said, that at that Rate there would be no End of this Affair. However the Court did give farther Time; for they said, that this was a new Execution, that was started; and therefore it was proper the other

Side

Side should have Time to answer it, which they according gave. And now M^r. Strange produced an Affidavit from the Marshal, that the Defendant was committed by the Name of Davie; but that the Security he gave to have the Benefit of the Rules was by the Name of Davis, so as there can be no Dispute as to Identity of the Person. Upon which Serjeant Darnel made a different Defence; and said, that the Defendant was a visible Man in Newington, working openly at his Business for several Months together before this Arrest, so that there could be no Occasion for any Contrivance to get him out of the Rules; and directly denied that any Force was used in making the Arrest, which was sworn to be out of the Rules; but the only one was when they were carrying him through the Rules upon this Arrest, and he was for making an Escape. But the Court said, it appears there was a Contrivance used to get him out of the Rules, and therefore they made the Rule absolute.

Dr. Snape and The Bishop of Lincoln.

ON Demurrer in Prohibition the Case was, that one M^r. Dale, a Fellow of King's College in Cambridge, had made a Speech upon a publick Occasion in the Hall of that College, in which he reflected upon the Provost and Fellows. For which Reason they put him out of Commons, and ordered him to retire to his Chamber. Upon that he sent them Word, that he would appeal to the Visitor, and for that Purpose desired Leave to go out of College. But without having any Leave given him he went out accordingly and appealed to the Bishop of Lincoln; upon which they expell'd him, and from this Sentence of Expulsion he appeal'd again. The Bishop accordingly came into the College, and visited them upon this Appeal. And whether he had a Right to do so or not, was the Question now before the Court. M^r. Reeves was Counsel for the Plaintiff. And in his Argument he laid it down, that in all Temporal Foundations, the Founder and his Heirs are Visitors by Law, unless another Person is particularly appointed. He said too, that either this Visitatorial Authority may be distributed into different Hands; or one Person may be appointed partial Visitor, and the remaining Part of this Power may continue in the Hands of the Founder and his Heirs. Now this, he said, was the present Case. For Hen. 6. who founded this College, thought proper to intrust the Bishop with the Exercise of this Authority only in particular Instances; but the remaining Part of it he either kept to himself, or would not have it exercised at all, for the sake of the Repose and Quiet of the Body. And this, he said, appeared from the 65th Statute which appoints the Visitor, and is styled, Statutum de Visitatione Episcopi Lincolnienfis per se vel ejus Commissarios in dicto Collegio facienda. The Statute begins, Cum speremus quod Episcopus Lincolnienfis (sicut nostri Collegii Regalis Visitator esse debet) Jurium & Privilegiorum Collegii Conservator esse velit; Idcirco volumus & liceat, that he shall have such and such particular Powers. Now he said, that the giving the Bishop some particular Powers in this last Clause was a circumscribing the general Jurisdiction, which

How far the only Remedy is to apply to the Visitor.

which he might have seemed to have given him before; for otherwise this Clause would be without any Effect. But what he said fully determined this Matter was, that there comes afterwards a Clause in this very Statute, which has Negative Words in it, and says, that the Ordinary shall have no farther Power, than has been particularly given him. The Words are, *per præmissa tamen prædicto Episcopo Lincolnensi seu ejus Commissariis, quoad alia, quam in præsentis nostro Statuto Regalis Collegii & aliis nostris Ordinationibus contenta, aut quod possint citare extra Collegium, or come in but once in three Years to visit, unless requested by the Provost and Bursers, aut aliquam aliam Potestatem, concedere non intendimus; sed Potestatem hujusmodi iis & eorum cuilibet adimimus omnimodo.* However Mr. Reeves said, if he should admit, that the Bishop had a general Authority of examining into all Matters relating to the State of the College, when he came in his triennial Visitation; yet there was no Pretence to say, he could come in upon a particular Appeal of a private Fellow; for this Statute restrains his coming in at any other Time than his general Visitation, unless called in by the Provost and Bursers. Besides he said, the Statutes appoint, that every Fellow and Scholar shall take an Oath not to appeal in any Case; for the Words are, That they shall obey the Orders of the Provost and Fellows absque appellatione aut querelæ obstaculo quocunque. But the Attorney General answered on the other Side, that as to the Extent of the Bishop's Authority, he thought it clear, it was General and Universal; for the instancing in some particular, principal Parts of this Authority could never take away the Rest of it, which was given by the general Words. He said it was a common Way of penning almost all Statutes of this Nature. And so this Point is settled in the Case of Philips and Berry, 4 Mod. And as to the Negative Clause, that, he said, did indeed confine the Bishop to the Place in which he should exercise his Jurisdiction, and to the Time in which he should make his general Visitation; but was far from tying him up to the Instances just before mentioned. Then as to the Bishop's coming in upon a particular Appeal of a private Fellow, he said, it was determined in the Case just before cited, that though a Time is stated by the Statute for a Visitor's exercising his general Jurisdiction; yet as incident to his Office he may de jure at any Time make a particular Visitation on a private Appeal, and examine into the Matters he was requested to inquire into, unless there is an express prohibitory Clause to the contrary. But that, he said, was not in the present Case; for at the most the Clause, which the other Side rely'd on, is but doubtful and obscure; the Word *adimimus* being in no Ways proper to signify a restraining of an Authority at that Time given, but to take away an Authority that was given, or might be thought to be given before. Now as to that, the Attorney said, it appears by another of these Statutes, that Hen. 6. had obtained a Bull from the Pope to take away the Ordinary Jurisdiction of the Bishop of Ely over the Members of this College, and to give it to the Bishop of Lincoln. By which Act it was something doubtful at the Time of the making of these Statutes, whether

whether the Bishop of Lincoln had not a Power of visiting this College, as Ordinary. And there are several Opinions scattered amongst the old Books, which favour this Notion, though now the Law is settled to the contrary. Then the Design of this Clause possibly might be to take away from the Bishop all Colour of visiting upon that Account. Upon which, the Attorney said, he would now consider the Force of the Oath. The Form of it is not in general Terms as the other Side stated it; but only the Party swears he will not Appeal, when he shall be punished propter sua delicta secundum exigentiam Statutorum. Now, who is the proper Person to judge of the Desertedness of this Punishment, but the Visitor? And as to the Word Appeal, which was relied on by Mr. Reeves, Mr. Attorney said, it might be understood of Foreign Appeals to Courts Temporal or Ecclesiastical, and not to this Statutable Visitor, who was appointed to redress all Grievances of this Nature; and to this Purpose he cited Dr. Yerbury's Case, 1 Keb. 166. and Appelford's Case, 1 Mod. 82. Upon which Matter he pray'd for a Consultation. But the Court said, that this was a Case of a good deal of Consequence and Difficulty, so would not deliver their Opinions till the next Term. Vide post
S. C.

The King and Johnson.

THE Defendant's Counsel being desirous to bring on this Indictment to Trial this Term, the Attorney General said, Vide ante
S. C. 79, 90,
91. that he should be as willing to do it as they; but it could not possibly be done; because as this Indictment was not originally found in this Court, there must be fifteen Days between the Cesse and the Return of the Venire facias; according to Sanchez's Case in Coke's Reports. He said too, he should be glad if this Indictment could be sent down by Mittimus into the Court from whence it was brought up, upon the Statute of 6 Hen. 8. 6. but that Statute only extends to Indictments of Murder and Felony. Upon which Mr. Strange said, that by Consent of the Defendant the Venire might be antedated; for there being so long Time allow'd is only for his Benefit. But the Court said, they would never allow of a Venire to be before Issue joined; and as yet the Defendant had not been arraigned upon his Indictment.

The Duke of Rutland and Hodgson.

THE Defendant had given a Promissory Note to the Plaintiff's Father in 1720, by which he engaged to pay him 11000 l. in Case he would transfer to him 1000 l. Capital South-Sea Stock, at or before the shutting of the Books for the then next Christmas Dividend. The Plaintiff's Father accordingly sent a Notice in Writing to the Defendant, that he would transfer this Stock to him on the Friday or Saturday next, being the Day for the shutting up of the Books. And then the Plaintiff avers in his Declaration, that his Father was at the South-Sea House on the Day to make a Tender, but that neither the Defendant nor any for him was there to receive the Transfer. Upon which the Plaintiff, as Executor to his Father, What shall
not be a good
Tender of
South-Sea
Stock.

ther, brings this Action. And now this Matter came before the Court upon a new Trial had at the Bar, the Verdict in the former Cause being contrary to Evidence. The Plaintiff gave in Evidence that the usual and only Time for making of these Tenders was between the Hours of nine and one, and that not so much as the transferring any Stock can be made but between these Hours, unless in these particular Days just before the Shutting of the Books for the making of their Dividends. That the Plaintiff's Father had a Person ready to make this Tender all the Time between those Hours; that three Calls accordingly were made; but that no Body came for the Defendant to accept it. The Court said, that this Matter was now brought to one single Point of Law, whether upon the Face of the Plaintiff's own Evidence it does not appear, that the Tender was not good; in as much as his Witnesses admit, that the Time for transferring Stock in these Days continues after the usual Hours, and in Fact this Time continued till late in the Evening? Upon this Question the whole Court delivered their Opinions, that the Tender was not good. For they said, in all these Cases the Tender of the Aa must be made at the last Point in which the Aa itself can be done. And this they said was held in the Case of Lancashire and Killingworth. So that this differs from the Tender of Rent, where the Law for the Convenience of Landlord and Tenant has appointed the Hour of Sun-set to be the last Period of Time for that Purpose. And therefore as the Law has appointed the Time for this Tender, no Usage to the Contrary for a few Years can alter it; for this same Reason too is it, that the Notice was wholly unnecessary. The Court delivering their Opinions in this Manner, the Plaintiff was nonsuited.

How far a
Certiorari
cannot be
granted by a
Judge at his
Chambers.

The King and Steers.

THE Court said, that no Certiorari should be granted by a Judge at his Chambers in Term-Time; and that they had lately agreed to this Rule.

Garnum and Bennet.

How far a
new Trial
shall not be
granted.

THIS was a Matter that was tried before Judge Probyn at the Assizes, and Special Point reserved for the Opinion of the Court. A Captain of a Ship, who was an Infant, had given Orders for Repairs to be done to it, and at the same Time gave a Promissory Note for the Payment of the Money, which the Work should come to; the Question now was, Whether the Plaintiff could not come upon the Defendant for the Money, as Owner of the Ship? Upon this Case the Court was of Opinion, that he could not. They did admit indeed, that if the Captain had given only general Directions for the Repairs, the Owners of the Ship would be chargeable, according to the Mercantile Law; because the Credit is put upon the Ship, as well as upon the Captain, so that the Plaintiff would have had it in his Election to have brought his Action against

against either of them. But here, they said, the Credit is upon the Captain only, and not upon the Ship; and therefore whatever Insufficiency the Captain lies under, it must be reckoned the Party's Folly for contracting with him; and consequently his being an Infant in this Case can make no Difference. They said the present Case was like that of a Woman's coming into a Shop to buy Goods, and the Owner's not being willing to trust her, because she is under Coverture; a third Person comes by and undertakes the Payment. They thought it clear, that the Owner cannot come upon the Husband for the Payment, for whose Benefit the Goods were delivered. The Court said too, that this would have been a different Case, if the Captain had first given general Directions for the Repairs, and afterwards had undertaken by his Note to pay for them; there indeed the Party may still come upon either; because his having once had a good Cause of Action against either, cannot be taken away by the one Party's expressly subjecting himself to the Payment. Accordingly the Court refused to grant a new Trial.

The King and Robinson.

THE Defendant having been examined upon Interrogatories, Vide ante 58. the Master reported him in Contempt. Upon which M. S. C. Lee moved, that he might be committed. But upon the Defendant's making an Offer to pay M. Chambers so much of his Debt as that Execution ought to have satisfied, and likewise all the Costs he had been at, the other Side consented, that he should not be committed. Upon which a Rule was drawn up by Consent, that he should have his Liberty. Vide post S. C.

The King and Upton.

IN an Indictment for Usury upon the Statute of 12 Ann. What shall not be said to be a good Indictment for Usury. sess. 2. cap. 16. several Exceptions were taken in Arrest of Judgment. One, that it was laid in the Indictment, that Anna Upton corrupte aggregatum fuit inter prædictam Annam Upton, and another, which was intirely insensible. Another, that it is not averred that ever any Money was lent in Pursuance of the Agreement. A third Exception was taken for the want of Addition to the Defendant's Name. And the last was, that there was no Venue laid. The Counsel said indeed, that the Parish of St. Clement Danes was mentioned in the Clause, where the corrupt Agreement was intended to be laid, but as that was an insensible Clause, whatever is in it, must be reckon'd as insensible too. But the Court said, that they did not see but they might reject the Words Anna Upton, and if so, the first and last Objections were answered. To the third they said, it ought to have been taken Advantage of in Abatement. But the second, they thought, there was a good deal of Difficulty to get over; for a corrupt Agreement does not seem to be within that Statute, unless it is carried into Execution. Upon which the Court was going to put it off to another Day, but Judge Reynolds, reporting that the Cause was tried before him, and C c that

that he thought the Evidence was but tender, the Court arrested the Judgment. Vide 2 Cro. 210. Where there is a much stronger Case than this. 3 Cro. 20. Sid. 247.

Fuller and Barnes.

How far
Oyer shall
not be grant-
ed of a Scire
facias to af-
sign Errors.

MR. Strange moved to have Oyer of a Scire facias. But it appearing that it was taken out to assign Errors, the Court said, they do grant this Motion in Scire facias's against Bail, and to revive a Judgment, but here they could not do it.

The King and —

AN Information was moved for against a Bailiff for replevy-
ing Goods, that were seized upon a Condistion on the
Same Act: And the Counsel to support his Motion cited the
Case of the King and Parsons, which was last Term. But the
Court said, that in that Case the Party, that replevied the
Goods, knew of the Condistion; but here it does not appear
he did; so refused the Motion.

Oates and Viscount Say and Seal.

How far a
Reversion
shall pass by
a Common
Recovery.

UPON the Evidence given in a Trial at Bar in Ejectment,
the Case appeared to be, That William Lord Twiselden, Vis-
count Say and Seal, was seized of the Lands in Question in Fee,
and had Issue James, Nathaniel, and two other Sons. In 1674
he made a Settlement of them to the Use of himself for Life,
with Power of making a Jointure upon any Wife he should af-
terwards marry, so that it should not be to more than the Value
of 500 l. Remainder to his Son Nathaniel in Tail, Remainder
in the same Manner to his two younger Sons, Remainder to
John Fines in Tail, whose Issue the Defendant was. After that he
did take to Wife Katharine, and then made an Appointment of
these Lands to her for Life, as a Security to her of an Annuity
of 300 l. to be paid out of the Profits of them, and died. Na-
thaniel entered with her Consent, and paid Lady Katharine this
Annuity constantly, and then suffered a Recovery of the Manors
of Braughton and Newton, which were settled by this Deed to the
same Uses as the Lands in Question, and which the Plaintiff
contended the Lands in Question were Part of, to the Use of
himself and his Heirs. Nathaniel dies without Issue. And now
Fines Twiselden, Lessor of the Plaintiff, makes his Title to the
Lands, as Son and Heir of Cecil, Daughter of Elizabeth,
Daughter of James Twiselden. The Point of Law, that arose
upon this Case was, whether, admitting the Lands in Question
to be Part of the reputed Manors of Braughton and Newton,
the Remainders in Tail were barred by this Recovery? Upon
which the Counsel for the Plaintiff said, that a Manor is a
Thing intire, and therefore that a Grant of a Manor will con-
vey all the Interests in it, that the Party has a Power to con-
vey. For which Purpose they cited Sir Moyle Finch's Case,
where it is held, that if a Lord grants away one of the Acres of
the Demesne for Life, the Reversion of it will pass by a gene-
ral

ral Conveyance of the Manor. They said too, that the Case of Thynn and Thynn, 1 Sid. 190. was a stronger Case than this; for there two Acres of Pasture had been leased out and enjoyed with a Manor only from the Time of Edward VI. and yet the Court was of Opinion, that they pass'd by a Grant of the Manor cum pertinentiis. Now they said, that the present Conveyance being by Way of a Common Recovery could make no Difference; for a Recovery is now become a common Assurance. And to this Purpose the Case of Walter and Jackson, 2 Roll 121. was applied; where it is held, that a Recovery of a Manor will pass the Reversion expectant upon one Acre in it. But the whole Court delivered their Opinions, that this Case differed from that of Walter and Jackson, which the other Side chiefly relied upon; for there they said, he that had the Reversion was Party to the Recovery, and consequently was estopped to say, he was not Tenant of the Freehold; but here, the Remaindermen expectant upon the Estate in Tail are not Parties to it, and consequently may set forth the whole Truth. They said then, that the present Question was the very Case with that of Blundel and Baugh, where it is held a Fine levied by Mortgagee does not divest the Estate of Mortgagee. So in our Case Nathaniel was Tenant at Will only, of this Part of the Lands, the legal Estate of the Freehold was in Lady Katharine, and consequently the Recovery void as to the Defendant. If indeed a Feoffment had been first made, they did admit it would have been different. But the true and proper Way in this Case would have been to have got the Tenant of the Freehold to have made a Surrender. Thus the Matter stood in Point of Law. And as to the Fact, the Counsel first produced attested Copies of Fines and Recoveries, and ancient Deeds, to shew that the Manors of Braughton and Newton were Manors in Reputation; though they could give no Proof of their being so in Reality; and for Evidence that these Lands were Parcel of them, they produced two Witnesses, who swore, that they were always reckoned so, and the other Side produced no Evidence to the contrary. The Case being thus, notwithstanding the Court delivered their Opinions as is above-mentioned, the Counsel for the Plaintiff desired they might have a Special Verdict found, in Case the Jury should be with them as to the Point of Fact. Upon which Minutes were drawn up accordingly; the Court directing the Jury to give their Verdict merely upon this one Point of Fact, whether the Lands in Question were reputed Parcel of the reputed Manors of Braughton and Newton? But the Jury bringing in their Verdict, that they were not, there was an End put to the Matter. Note; the Court said, they were of this Opinion as to the Point of Law, for the Reason that I have mentioned. But yet Mr. Fazakerly cited the Case of Johnson and the Earl of Derby, which he had got the Special Verdict of in his Hand, and he said was directly with the Defendant, even admitting the Manors in the present Case to have been real ones. There the Manors of Newpark and Newbery were always reputed Parcel of the Manor of Latham. An Estate for Life had been granted of these two Manors, and then a Recovery was

The Construction of the Grant of a Manor.

suffered

suffered of the Manor of Latham, and it was determined the Reversion of the other Two did not pass.

Lewis and Baker.

How far the
Courts of
Law will not
make a Rule
for the In-
spection of
Books.

*See 1. Term
Rep. 609.*

MR. Abney moved to have Inspection of the Publick Books, belonging to the Vicar and Church-wardens of St. Sepulchre's, the Question being upon a Demise under that Corporation, which was disputed in an Ejectment. And to support his Motion, he said, that the Court had made the like Rule in the Case of a Clerk to a Dean and Chapter, where his Office was in Dispute; which was a Matter of as little Consequence to the Publick as this. But the Court said, that was a publick Office; but this is only a Matter of a private Right; so refused the Motion.

Fortescue Aland and Mason.

Vide ante 5.

A Writ of Error was brought by the Plaintiff as Remainder-man expectant upon an Estate-tail in Ireland, to reverse a Recovery suffered of these Lands in the Common Pleas in Ireland, on which Recovery a Writ of Error was brought in the King's Bench there; but upon one of the Defendants in Error pleading his Infancy, Judgment was given quod loquela remaneat. And now M^r. Strange took several Exceptions to the Allowance of this Plea. And first he said, that the Infant was in by Descent, and therefore he could not plead it. So is it held in 1 Roll. Abr. pl. 33. Another was, that the Defendant who pleads this does not shew himself to be Ter-tenant; and indeed the contrary appears by a Return made to the Scire facias against the Ter-tenants. But besides, he said, that which was assign'd for Error was Error in Law; and therefore he could not plead his Infancy; for Matters of Law are left to the Court to judge of, and therefore they will take Care, that the Infant shall not be prejudiced. And this Distinction between Errors in Law and Errors in Fact is taken by M^r. Justice Dodderidge in 3 Bulst. 139. Farther he said, admitting he might have his Infancy allowed him, yet the Plea is wrong; because it is pleaded after an Imparance; which being a dilatory Plea is therefore improper. Another Exception to the Manner of Pleading this was, that he has not said, what Age he was of; and that is necessary in order that the Court may award a Return after he comes of full Age. So is it pleaded too in Coke's Entries 156. M^r. Strange excepted too to the Form of the Judgment, its being quod loquela remaneat generally as to all the Defendants, whereas it should have been only as to the Infant. He then took several Exceptions to the Recovery itself. One that the Writ of Entry was for ducentum acras bosci & sub-bosci; which is uncertain. To this Purpose the Case in 1 Roll 779. was cited, where a Recovery of two Acres Terræ & Pasturæ was held to be bad. Another, that the Writ of Entry was brought for tria Castria, whereas it should have been Castra. And he said, if the Judgment is in these Respects bad, it cannot be affirmed for the other. So is Cro. Car. 471. The last Error as-
signed

signed was, that there are two Tenants in this Recovery, who vouch Jonathan Aland, and he enters into Warranty, but only says, & ei warrantisat; which is uncertain, which of them he warrants to, and yet the Judgment is for both of them to recover over against him. But Mr. Bootle answered on the other Side, that there was a Variance between the Writ of Error and the Record brought up; the Writ of Error being of a Recovery suffered by Jonathan Mason Tenant for Life, whereas the Record brought up is of a Recovery suffered by Jonathan Mason, Tenant in Tail, so that there was no Occasion now to give an Answer to the Exceptions. But the Court said, they could not indeed go on upon the Writ of Error, till it was amended; because, as it now stands, there is a Variance; but yet it was clearly only a Mistake, because if he was only Tenant for Life, the Plaintiff might certainly enter. So ordered it to stand over.

Vide post
S. C.

Garner and Lanfon.

AFFIDAVIT was made, that the Defendant gave the Plaintiff a Warrant of Attorney to confess a Judgment. The Plaintiff gave his Attorney a Guinea for drawing it, and two Guineas for entering it up. Notwithstanding this the Attorney took no Care to do it, and the Defendant has been now dead near a Twelvemonth. Upon which the Court made a Rule to shew Cause, why an Attachment should not go against him.

How far the
Court will
grant an At-
tachment a-
gainst an
Attorney.

The King and Woodman and others.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against Woodman for exercising the Office of Bailiff of the Borough of Andover, and against three other Defendants for taking upon them the Offices of approved Men in this Town, not being Inhabitants at the Time they were chosen Burgesses, the Counsel said, that the Affidavits, on which the Rule was made were not certain enough, they only speaking in general, that they were not Inhabitants of this Borough, without saying of what other Place they were Inhabitants. But besides, they said, they had Affidavits directly shewing the contrary, not in a general and insufficient Manner, but by particular and positive Evidence. And the Attorney General said, that if such Evidence as this would not prevail, he did not see, to what Purpose it was to make a Rule to shew Cause in these Cases, and why an Information cannot go directly. But the Court said, that the Intent of these Rules is to give the Party an Opportunity of Discovering to the Court the Evidences of the Plaintiff's Charge; and not by positive Words to deny it, which is the present Case. Upon which the Counsel said, that they had something farther to offer, and that was, that these three Defendants had continued in the Exercise of their Offices for five or six Years, and therefore they hoped, they should not now be disturbed in the quiet Possession of them. To this the Court observed, that if it was a small Slip only in their Elections, they would not suffer them to be molested.

How far the
Court will
not grant an
Information
in Nature of
a Quo War-
ranto in or-
der to try an
Election, by
Reason of
the Length
of the Time.

ed after so long an Enjoyment; but that which is offered against these three Defendants goes to the very Merit of their Right; and they know no Time which would bind the King in such Cases from calling their Elections in Question. This, they said, was the established Distinction; and accordingly granted the Information against these three Defendants, and Woodman too of Consequence, whose Election must fall of Necessity with the others. The Court made a Distinction too between these Informations moved for against the Parties themselves, who have continued in these Offices so long, and Informations moved for against Strangers; for in them, they admitted, such Elections as these cannot be controverted.

The King and Johnson.

Vide ante 79,
90, 91. S. C.

THE Defendant having withdrawn his Plea, the Attorney General demanded an Award of Execution against him; upon which he pleaded the same Matter ore tenus, which he had before delivered in Writing. Upon that the Attorney replied, that he was within the Kingdom at the Time of the Outlawry pronounced, and traversed his being out of the Realm. Issue being joined upon this Point, the Defendant was immediately tried upon it and acquitted. Then the Attorney General said, that there was no Reason for any Judgment to be given upon this Outlawry; and the Court was of the same Opinion, because when he has proved, that he was out of the Realm, the Statute says the Outlawry shall be void. Upon which the Defendant was arraigned upon his Indictment; and a Trial ordered to be at the Bar next Term.

Vide post.
S. C.

Blinkinop and Eyles.

What shall
be a good
Judgment
given on a
Plea in an
inferior
Court.

THIS was a Writ of Error upon a Judgment given in the Court of N. in the County of York. The Record set forth, that a Plea was levied in a Plea of Trespass, whereon Process was prayed, and the Defendants brought into Custody. On which the Plaintiff declared against them for taking a Gate, and breaking his Shop. Upon this there was an Imprimatur; the Defendant pleaded Not guilty, and Judgment was given against him. Mr. Filmer took several Exceptions to the Judgment. First he said, Lord Burlington was Steward of this Court, and it is said to be held before Thoma Fletcher subfeneschallo hujus Curie secundum consuetudinem; but it does not appear, that he was ever appointed by Deed. Then, he said, the Plea was too general; for it is only de placito Transgressionis; without saying what Sort of Trespass. And a Case to this Purpose is in Style 86. Hales and More; where de placito debiti was held ill; because it was not laid in what Sum the Action was. Another Exception he took to the Process; for the Defendants were taken up by a Capias, whereas an Attachment ought first of all to have issued, as it is in Trespass; and a Summons, if it had been in Debt. A fourth was to the Venue; that the Precept was directed to a Bailiff, to order him to impanel a Jury of twelve Men, per quos veritas melius scire possit;

possit; whereas it ought to have been Sciri. To this were cited the Cases of 1 Roll. Abr. 800. Lutwyche 957. Skinner and Newton, Trin. 9 Ann. A Fifth was, that it was said of the Jury, qui ad veritatem dicendam per eandem Curiam electi, triati & jurati; whereas they ought to have been tried by Persons appointed by the Court, and not by the Court itself. To this Purpose the same Case in Lutwyche was applied. The last was to the Conclusion of the Judgment; for its being said, that so much was given him for Costs and Damages, but not circa sectam soam in hac parte apposit'. To this was cited the Case in Style 164. And that was upon an Exception after a Verdict. But the Court was of Opinion, that none of these Exceptions were fatal. For to the first they said, this is only in the Style of the Court, and as it is said to be secundum consuetudinem, it is therefore good enough. To the second, they did not think the Case in Style to be Law; and it is only an Opinion of one Judge; and therefore it did not warrant the Exception. They thought indeed, that the next had more Weight in it; and there are Opinions in the old Books to warrant it; but it appears by the Record, that he appeared and pleaded over, without taking Advantage of the Illegality of the Process; and the Law is now settled upon that Distinction, that he may take Advantage of it before he pleads any other Matter, but not afterwards. To the fourth, they said, that they were of Opinion it would have been ill, if the Record it self had been as it was stated by the Counsel; but it appeared by the Roll to be right. They thought the Fifth might be got over reddendo singula singulis. And to the last, Judge Reynolds observed, that the Jury gave the Damages right, for they have given them circa sectam in hac parte apposit'; and the Judgment is for so much by Way of Incrementum pro misis & custagiis prædictis; which refers it very well to the Suit aforesaid. Accordingly the Court affirmed the Judgment. They said too, that the Statutes of Jeofails extend to these inferior Jurisdictions. Lev. 289. 1 Ven. 240.

Palmer and Ekyns.

THIS was a Matter, that had been depending several Terms, and now the Chief Justice delivered the Resolution of the Court upon it. It was an Action of Covenant, that was brought for Rent; the Plaintiff sets forth his Title to it, that John Palmer was seised in Fee of the Lands, from which the Rent is due, and by Indenture demised them to the Defendant in 1716, for twelve Years, rendering Rent; that the said John being thereupon seised of the Reversion granted it to Henry Palmer the Plaintiff and his Heirs; that certain Rent is become due, by Means of which he brings this Action. The Defendant pleads, that true it is, that John Palmer was seised of these Lands in Fee, but that he granted them by Feoffment to one Brag in 1706. To which the Plaintiff demurs generally. The Chief Justice said, that if the Defendant had pleaded directly, that the Lessor Nil habuit in Tenementis, the Plea would certainly have been bad, as it is held in Salk. 277. Now the present Plea is nothing but a special Nil habuit in Tenementis; because by the Rules

What shall be said to be a special Plea of Nil habuit in Tenementis.

Rules of Law an Estate by Feoffment once vested in a Person must be intended to continue in him till the contrary appears; and therefore it is clear the Lessor himself might have taken Advantage of this Plea upon a general Demurrer. The Question then is, whether the Lessor's Assignee can do it? To this, the Chief Justice said, that all Estoppels annexed to the Interest of Land go with the Land, and therefore as the Plaintiff has the Land, he must have all Benefit belonging to it. And this Case, he said, he thought was distinguishable from that in Cro. Eliz. 436. which the other Side principally relied on. He said too, that Estoppels were of that Nature, that they bind the Court and Jury as well as the Party himself, wherever they are relied on; but yet the Party may waive the Benefit of them, and then the Court and Jury are left at large. As if a Defendant should plead Nil habuit in Tenementis, and the Plaintiff should join Issue upon it, the Court and Jury are not tied up to the Estoppel, but may relieve the Party according as the Truth of the Case requires. Accordingly Judgment was given for the Plaintiff. 3 Cro. 141.

Jones and Mason.

What shall be said to be a good Declaration by an Assignee of a Bail-Bond.

IN an Action upon a Bail-Bond, Demurrer was to the Declaration. The Exception was taken to it, for that it was brought by an Assignee, and it does not appear, that he has brought himself within the Act for the Amendment of the Law, which allows of such Assignments. For the Statute says, that the Assignment of every Bail-Bond shall be stamped, before any Action shall be brought upon it; and it does not appear by the Declaration, that ever it was stamped. The Counsel admitted, that if the Statute had required this in a distinct Proviso from the Body of the Act, it ought to have been shewn on the other Side, that the Assignment was not stamped; but here it is necessary for the Plaintiff to shew that it was stamped, because the Statute requires this in the very Body of the Act, and makes it to be one of the Terms of his Taking the Benefit of it. But the Court said, that these Statutes are upon the Roll in one intire Clause, so that there could be no Distinction between its being in a distinct Clause and not. They said besides, if they were to allow of this Exception, they might reverse all the Judgments that have been upon this Statute; accordingly gave Judgment for the Plaintiff.

Hornby and Cornsworth.

How far the Statute of Ed. 6 c. 15 to prevent the Buying and Selling of Offices is only a private Law.

IN Debt upon Bond, the Plaintiff set forth the Condition to have been for the Performance of several Things. The Defendant shewed a Performance of all but one, which was omitted. On which there was a special Demurrer. But however Serjeant Hawkins said, that the Declaration itself was bad, for one of the Things to be performed was, to pay the Plaintiff 5 l. yearly for executing for him the Office of Bailiff in the Duchy of Lancaster; and such a Bond is void by the Statute of 5 & 6 Ed. 6. cap. 16. And this the Serjeant said was a publick Statute, because it related to all Offices in general. But the Court said,

said, there was an Exception of Offices, that are in Fee and express-ly within the Statute, and therefore you ought to have shewn, that you were not one of the Persons excepted; and if you had done that, Judge Reynolds said, the Court would have been bound to have taken Notice of your Case. However it stood over. Vide post S. C.

Thomas and his Wife *against* —

Motion was made, that the Court would inspect a Writ of Enquiry, and increase the Damages, that have been given upon a Writ of Enquiry. The Court said, they may do this in Battery as well as Nuyhem. But here it appeared only that a Woman had received a violent Blow, which had broke the Skin of her Nose; and this had affected her Voice so, that she in a Manner had lost her Speech, so that she could not follow the Business she had before supported herself by of crying Things about the Streets. For which Reason they had nothing to inspect in this Case, and therefore they said, they could not do any Thing in it. How far Damages may be increased by the Court upon an Inspection.

The King *and* Steers.

MOTION was made for a Certiorari to remove up an Indictment from the Quarter-Sessions. No Judgment had been given; because at the Time the Indictment was trying, a Certiorari came down from the Court of Chancery returnable here. That Certiorari, the Court said, was void. But however the Counsel said, the Justices below were afraid to go on; which was the Reason, why he made this Application to the Court, that they would be pleased to give the Judgment, as a Verdict had been had already. But the Court said, this was an Indictment for a Riot, where the Fine is Discretionary; and therefore they could not do it. Indeed where the Law appoints a certain Judgment, as in Felony, &c. there they said they could do it. But then the Counsel prayed a Certiorari, that he might take an Exception in Arrest of Judgment, for there being but two Persons only found guilty of the Riot, whereas there ought to have been three at least. The Court said, where there were any general Words in Indictments to charge other Persons unknown for joining with one or two particular Persons in such Offence, that would make the Indictment good enough. Judge Reynolds cited a Case, where an Indictment charged one Man with being guilty of a Riot cum centum ignotis; and that was held good. How far a Certiorari cannot issue out of Chancery to remove an Indictment. When an Indictment is removed up by Certiorari into the King's Bench how far that Court cannot set the Judgment upon it.

Moxam *against* Penny and Downs, Church-wardens of the Parish of St. Bennet's in Glassenburgh.

How far a Person may be rated to the Repairs of a Church according to his Stock in Trade.

A Prohibition was moved for to stop the Defendants suing in the Court of the Vicar General of the Diocese of Bath and Wells. The Defendants libelled there upon a Custom in their Parish, that every Parishioner was chargeable with a Rate for the Repairs of the Church, according to his Stock in Trade, per Canones Ecclesiasticas & Regias Constitutiones. They averred that the Plaintiff, who was a Quaker, was a Parishioner, and had a Stock in Trade, but that he had refused to bear his Proportion in a Church Rate. The Plaintiff denies the Custom in his Plea, and traverses his being a Parishioner. And upon this Suggestion the present Motion was made. Mr. Draper said, he should submit it, whether any Man's Personal Estate was chargeable with the Repairs of a Church; the landed Inheritance is adapted to that Purpose; but his Personal Property is only liable to a Rate, made for the Ornaments of the Church. He said farther, admitting a Man's Personal Estate was subject, he thought it would be pretty hard to carry it so far, as to say, that his Stock in Trade should, for that would be subjecting the Tradesman to greater Inconveniences, than others in the Parish. Besides, the Statute of 7 & 8 W. & M. 34. has established a particular Method for the Recovery of Ecclesiastical Duties owing from Quakers, by applying to a Temporal Consueance; and therefore the Bishop's Court was not a proper Place for the Defendant's Application. Thus much was said upon the Face of the Libel itself; but then Mr. Draper observed, that this Suit, that is now going on, is still more improper upon the Defendant's Plea; because the Ecclesiastical Courts have not Authority to try either of the Points that are denied in it. To this the Court made answer, that there are some old Opinions in the Books to support the Distinction mentioned, but that the Law was now settled to the contrary. Then as to the second Observation, they said, it has been determined, that a Stock in Trade is liable to a Poor's Rate, and they could not distinguish that from the present Case. To the third, they said, that Statute gives a new Method of Recovery, but has no Words to take away the old one. And Judge Reynolds cited a Norfolk Case, which he was of Counsel in, where the Church-wardens actually applied to two Justices to give Relief in a Case of this Nature, and they would do nothing in it; upon which they went into the Ecclesiastical Court. A Prohibition was moved for in the Common Pleas, and upon Debate refused. To the fourth Inducement, they observed, that this was not a local Custom, which was libel'd upon; but only a Custom by the Canon Law, which was nothing else but the Canon Law itself. And to the last Argument, they said, that the Ecclesiastical Courts had Consueance of who were Parochial Persons, as well as what were Parochial Rights, and accordingly were refusing the Prohibition; but several Cases being cited out of the Canon Law, they made a Rule to shew Cause; and no Body opposing it afterwards made it absolute.

Robottom and Roe.

ON Rule to shew Cause, why an Attachment should not go against one Clendon, for extorting two Guineas from the Defendant, before he would allow him to be bail'd, his Counsel said, that the Defendant absconded, and for that Reason Clendon was forced to be made a Special Officer in the Writ; and the Fee for that is 10s. of the Money. Besides he was two Days lying in watch for him, with a couple of Followers, and he thought 1 l. 12 s. little enough for that. The Court said, the Fee of 10s. is certainly due; and the Rest of the Money is moderate enough; but yet it ought not to have been demanded of the Defendant; so granted the Attachment.

How far the Court will grant an Attachment against a Bailiff for Extortion.

The King and Husk & al'.

THE Court was moved to quash a Writ of Nockanter for breaking down of Hedges, which was founded upon the Statute of 6 Geo. I. 16. But the Court said it was in the Nature of a Civil Suit; so refused to do it.

How far the Court will not quash a Writ of Nockanter.

Budicome and Jones.

MR. Reeves moved to set aside a Writ of Inquiry, which was had in an Action brought against the Defendant for living with the Plaintiff's Wife. One Reason was, that the Jury have given but 6s. 8d. Damages. Another, that they were interested for the Defendant. The Court said, where indeed the Damages are certain upon the Face of the Declaration, they do set these Writs of Inquiry aside, if they do not give as much. But in other Cases they never do it. And as to the Exception about the Jury's being interested, the Court said, you should not have gone on then. So they would do nothing in it. 1 Lev. 97. 1 Ven. 65.

How far the Court will not set aside a Writ of Inquiry by reason of the Smallness of the Damages.

The King and Chapman.

MR. Fazacherly moved to discharge a Rule for the Inspection of publick Books, for its being drawn up too general. He said, it was drawn up, that the Defendant should have Inspection of the Records and publick Books, and that would intitle him to see the Charter. The Court said, that they did not know that the Records of the Corporation did include the Charter, for that is a Record of the Court of Chancery. And these Rules are always drawn up in this Manner. So they refused the Motion.

When a Rule is made to inspect the Books of a Corporation in what Manner the Rule is to be drawn up.

The

The King and Willis.

How far the Court will direct that a Venire facias de novo shall be awarded.

HERE were two Indiaments. But by Mistake the Panel of the Jury, that were to try Bromley, was return'd upon Willis's Distringas; and the Panel of the Jury, that were to try Willis, was returned upon Bromley's Distringas. For which Reason the Court thought, that both Indiaments were tried by Persons without Authority; accordingly ordered Venire facias de novo to be awarded. 2 Cro. 396.

The King and Mallard.

How far an Indiament is not the proper Remedy to recover a Penalty given to the King by Act of Parliament.

IN Arrest of Judgment upon an Indiament for burning Bricks and Stock-Bricks in the same Kiln, upon the Statute of 12 Geo. 1. Mr. Reeves said, that there's a particular Method of Proceeding chalk'd out by this Act, which gives the Master and Company of Bricklayers a Power of setting a Fine of 20 s. for every thousand Bricks burnt contrary to the Act. So that this present Course is wrong. The Court did not enter into that Exception, but said, they thought it bad upon another; because an Indiament does not seem to be a proper Method to recover a Penalty given to the King by an Act of Parliament. They thought this was proper only for a Prosecution in the Exchequer; so arrested the Judgment. 1 Ven. 63. Sal. 460.

Neve and Foster.

How far the Court will stay Proceedings against Bail.

THE Plaintiff swore that his Debt was 60 l. so held the Defendant to Special Bail; and then recovered 79 l. Now the Counsel moved, that upon bringing this Sum of 60 l. into Court with the Interest and Costs, the Proceedings against the Bail might be staid, which the Court granted; for they said, that otherwise the Intent of the Act would not be observ'd; which was to secure the Bail. Indeed in the Common Pleas, they said, this Act has not this Effect, because the Bail are bound there in a Sum certain. But however the Court said, you must file a common Appearance likewise for the Defendant, which they agreed to.

The Inhabitants of St. Michael's Norwich and The Inhabitants of St. Matthews in Ipswich.

How far the Settlements of Children vary with the Settlement of their Parents.

ONE Edmund Williams had gained a Settlement in Shipton-Mallet in Somersetshire; from whence he removed to Bruton in Norfolk, and there had Issue Edmund the Younger, who lived with his Father there for nineteen Years; Edmund the Younger marries and goes with his Wife to Norwich, and there has several Children by her. Edmund the Grandfather in the mean Time goes to Ipswich, and there gains a new Settlement. Upon which two Justices make an Order for removing Edmund

Edmund the Father, his Wife and Children to the Settlement newly gained by the Grandfather. The Parish of St. Matthew's in Ipswich upon this appealed to the Quarter Sessions, and the Justices there accordingly made an Order to send them back again. And now Mr. Lee moved to quash this Order of Sessions. For he said, the Settlement of Edmund Williams the Younger, and consequently of his Children, properly followed Edmund Williams the Elder's Settlement; for till they have gained a new Settlement for themselves, they must be upon Edmund the Elder's Settlement. But the Court said, as they were not Part of the Grandfather's Family at the Time he gained this new Settlement, because they had left him, and were upon their own Establishment; consequently no new Settlement of the Grandfather can be any Benefit to them. To this purpose they applied the Case of St. Giles's Reading and the Inhabitants of Eversley Blackwater, Trin. 9 Geo. 1. where it was held, that a Son's serving an Apprenticeship, and by that means gaining a Settlement of his own, intirely discharges the Parish, where the Father's Settlement was before. The Question then is, Where the Settlement must be for the Father and his Children. Ipswich is not, Norwich cannot; Mr. Fazacherly said, Bruton must not; because a Man's Settlement is not to be where he is born, but where his Father's Settlement is at the Time he is born; and therefore Shipton Mallet seems to be the Place, where they ought to be sent. However as this was a Case of some Difficulty, the Court made a Rule to shew Cause.

Vide post
S. C.

Crayfoot and Crackcraft.

MR. Strange moved for a Procedendo to send down an Ejectment into the Sheriff's Court of London, which was removed from thence by a Habeas Corpus cum causa. The Reason he gave was, that this Ejectment was only between nominal Persons, and therefore the Habeas Corpus cum causa would not lie. But Mr. Wynn said, that the Sheriff's Court had no Jurisdiction in Ejectments, as appears by 4 Inst. and for that Reason it was proper to remove it. And as to the Objections made by Mr. Strange, the Court said, it amounted to as much as if he had said, that no Ejectments could be removed from thence at all; accordingly denied the Motion. The true Reason for bringing this Habeas Corpus cum causa, Mr. Wynn said, was, to have the Opinion of this Court upon a Point of Law, whether, if a Mortgagee comes in with other Creditors upon a Commission of Bankruptcy, he shall continue still his Interest in the Mortgaged Premises; or whether, he does not by such Act waive the Benefit of his Mortgage, and shall be considered only a common Creditor?

How far an
Ejectment
will not lie
in the Sher-
riff's Court
of London.

Milbourn and Stephenson.

How many
Days No-
tice is re-
quisite to be gi-
ven upon a
Writ of In-
quiry.

MR. Filmer moved to set aside a Writ of Inquiry, which was executed at York, upon account of there not being fourteen Days Notice given; which he said by the Rules of the Court they were intitled to, as the Parties live above forty Miles from London. The same he said, was of Notice of Trial. But the Court observed, that there is but eight Days Notice requisite as the Writ was not executed in London or Middlesex.

Tulley and Sparks.

Vide ante 81.

THE Defendant's Counsel mov'd to set aside an Execution, by which Part of the Judgment was levied since a Writ of Error brought. The Court said, you must make out one Fact, that the Allowance of the Writ of Error was before Execution. The Counsel had the Allowance in his Hand, but that he could not do. Upon which he made a farther Motion, that a Rule might be made upon the Plaintiff not to go on with the Execution. But the Court said, they could not make a Rule quia timet; and if the Plaintiff should go on, that Court where you have taken out your Writ of Error will lay him by the heels, and set the Execution aside.

The King and The Sberiff of Leicestershire & al'.

How far the
Court will
not grant an
Attachment
against a Per-
son for re-
plevying
Goods which
have been
seised upon a
Warrant of
a Justice of
Peace.

Vide the
next Case.

THIS was an Attachment that was mov'd for against the Defendants for replevying three Horses, which were seised as forfeited upon a Justice's Warrant, they being driven in a Waggon against an Act of Parliament. The Act says, that there shall not be above three Horses driven in any Waggon, where the Wheels of it are not two Inches and half thick; but here there were six Horses driven in it, where the Wheels of it were not so broad. And the Case of The King and Birchin was cited by Mr. Abney, which was, where two Persons were convicted upon the same Act, and the Justices granted their Warrant of Distress; and yet the Steward of the Liberty replevied the Distress; and a Rule was made to shew Cause for an Attachment in that Case. He said farther, that if these things were allow'd, the Effect of these Acts would be rendered to no Purpose. The Court said, the Attachment was not granted in the Case cited, only a Rule to shew Cause. And they thought it would be enough to grant an Information; so they accordingly made a Rule to shew Cause.

The King and The Sheriff of Leicestershire & al'.

Vide the
Case before.

THIS Matter coming on again upon a Rule to shew Cause, the Court thought there was enough to excuse the Sheriff, but granted it against Parsons whose Horses were seised; because he knew that the Justice had granted this Warrant; but it did not appear that the Sheriff did.

Term. Hill.

2 Geo. II. 1728.

The King *and* Floyd.

ON Rule to shew Cause why an Information should not go in this Case, the Counsel said, that the Complainants received no real Injury, though they were in some Danger of it; and therefore they ought in this Case only to have exhibited Articles of the Peace. But the Court said, there is no Occasion that the Party should receive a bodily Injury; for if a Man sends a Challenge to another in Writing, they constantly grant an Information. Then the Counsel made another Objection, that the whole of the Complainant's Charge was positively denied by Affidavits, which the Defendant had to produce. But as to that the Court said, that as this was a Charge of a very outrageous Assault, it therefore ought to be tried, so granted the Information. Anto 77.

The King *and* Farwell.

MR. Wynn moved to discharge a Recognisance, which the Defendant had entred into for the Security of the Peace, because he was now dead. But Mr. Strange objected, that this was no Reason for discharging it; for if it was not yet broken, the Recognisance could signify nothing. But then he farther said, that it was really broken, and that was a Reason, why it ought to stand. But the Court said, that the Defendant was a Lunatick, when he entred into the Recognisance, and was under the same Circumstances when he broke it; and therefore, as now the Peace was out of all Danger of being broke by him, they thought it was hard that the Estate in the Heir's Hands should suffer; and accordingly discharged it. The Sureties too were discharged upon the same Account. How far the Court will discharge a Security which is entered into for preserving of the Peace.

The King *and* Johnson.

MR. Kettelby moved, that the Court would be pleased to appoint a Day for the Defendant's being brought up to receive his Trial. But the Court said, that he could not make this Motion as Counsel; for the Treason, which the Prisoner was charged with was not within the Statute of 7 Will. 3. cap. 3. Anto 79, 90, 91, 101.
as

Vide post
S. C.

as the Attainder of it works no Corruption of Blood; and therefore he could not be allowed Counsel within the Benefit of that Act. They observed farther, that this Application could not be made without the Prisoner's being present. Upon which Mr. Kettelby desired, that the Court would grant a Rule to bring him up. But the Attorney General said, that he apprehended, he could only be brought up by Habeas Corpus; but if he had appeared this Term before, he allowed a Rule of Court would be now sufficient. But the Court said, he was committed to Newgate by Rule of Court when he was brought up from thence, and therefore they might now send for him up in that Manner again. So made such a Rule in this Case.

The King and Robert Hale.

How far a
Person shall
be said to be
a Principal
in Forgery.

How far an
Indorser of
a Note shall
be liable.

How far an
Information
shall be
granted a-
gainst a Man
for persua-
ding another
from attend-
ing as a Wit-
ness at a Trial.

ONE William Hale, Brother to the Defendant, was a Man in pretty low Circumstances, and had supported himself for some Time by discounting of other People's Notes, which they used to trust him with. The Defendant had several Times been serviceable to him in this Way. And upon the 21st of May last his Brother came to him to desire him to do him a Piece of Service of this Nature, by drawing a Note, payable to one Mr. Samuel Edwards; and he told him, he did not fear but he could get Mr. Edwards to indorse it. The Defendant accordingly did this; and the Note was for 800 l. which he subjected himself to the Payment of. Afterwards the Brother forged this Indorsement; and the Defendant was privy to it, but he would not discover it. The Defendant was now indicted for this Forgery, and upon these Circumstances the Jury found him guilty. In the Direction which the Court gave to the Jury they told them, that admitting he was privy to it at the first, he was a principal in the Forgery; for in Crimes of this inferior Sort, the Law allows of no Accessories. Another Point too fell into Debate upon something Mr. Reeves said in Proof of the Defendant's Innocence, that he made himself liable at all Events, and that the Indorser was chargeable only in Default of the Drawer, if he was insufficient; and therefore it could not be conceived how the Defendant should be guilty of such a Piece of Villany to prejudice a third Person, when he himself was alone immediately liable. But the Court said, that that was a Mistake in Point of Law. Indeed, they said, that upon Trials of this Sort in Actions upon Notes against Indorsors, Evidence is always given, that the Drawer was requested to pay the Money, and that he refused; but never that he was unable. And Judge Reynolds said, in Bills of Exchange that is not necessary.

The King and Chamberlayn.

ON Rule to shew Cause, why an Information should not go against the Defendant, for persuading a Witness not to attend a Trial; his Counsel said, that the original Cause was not depending in Court, and therefore this Court could not concern themselves in it. They said too, that there are other Offences

Offences as great as this, viz. Perjury, &c. which the Court would not grant an Information for, tho' the Cause should be depending here. But the Court said, that they did not know, but they might grant an Information for Perjury, if the Proceedings were depending here. And they said, it was certain the original Cause was in Court at the Time of this ill Practice, for tho' indeed it was commenced below, yet a Certiorari was issued out to remove it up, and it is a Cause in Court from that very Instant. Accordingly they granted the Information.

N. B. The Cause below was an Indictment of Forgery against one Crooke, and within two Days afterwards another Motion of this Sort was granted in the same Matter.

The King *and* The Bailiffs of Scarborough.

MOTION was made for an Information against the Defendants for a very great Abuse in the Exercise of a Jurisdiction, which they took upon themselves as Justices of Oyer and Terminer, without any Colour of Authority. The Court said, if they have not such an Authority, the proper Remedy is a Quo Warranto; and if they have, it is an Authority of that high Nature, as this Court will not grant an Information for the Abuse of. Salk. 397.

How far the Court will not grant an Information against Persons for exercising a Jurisdiction without an Authority.

The King *and* Clendon.

MR. Keutelby moved, that the Defendant might be discharged out of Custody upon his making a Submission and paying all the Costs he had put the Defendant in the Action to: The other Side opposed it, because he was not yet taken up upon the Attachment. The Court said, it was your own Fault in not taking out the Attachment yet; however they said, they could do nothing in it till he was brought here in Person.

How far a Person must be present in Court at the Time a Motion is made.

The King *and* The Inhabitants of Darlington.

MR. Abney moved to quash a Return to a Certiorari, directed to two Justices of Peace, because it was only made by one. But the Court over-ruled the Exception, because they are judicial Officers. Upon which he took two others, that the Return was in English and likewise upon Parchment, and both those the Court allowed; and made a Rule upon them to make another Return, for this they said was none.

What shall not be said to be a good Return to a Certiorari.

Dunbald *and* Aldworth.

MOTION was made to have Time to plead till the Plaintiff gives Oyer of the Bond, which he declares upon. The Court said, he has declared with a Profert in Cur', so that his Declaration is not compleat without giving Oyer; and therefore this Motion is not necessary, for he cannot go on without it. Indeed in Originals, &c. this Motion is necessary. And therefore they did nothing in it.

How far Oyer is not necessary to be demanded.

Buroughs and Willis.

How far Officers of the Court have a Right to lay the Venue in Middlesex.

THE Plaintiff was a Master in Chancery and Barrister at Law, and had laid the Venue of a personal Action in Middlesex. The Defendant moved to change it, but the Court was of Opinion he could not; for they said, Officers that are bound or have Business to attend at Westminster-Hall, have a Right to have the Venue in these personal Actions laid in Middlesex. And to this Purpose the Cases of Knight and Farnely, Salk. 670. and Hicks and Foot, Hill. 9 Geo. 1. in the Common Pleas were applied.

Jones and Mason.

How far the Court will direct that different Causes of Action shall be joined in one Action.

THE Plaintiff brought several Actions for different Arrears of Rent upon the same Lease; upon which the Defendant moved, that the Plaintiff might join them in one. Judge Reynolds said, if these were several Actions upon different Notes, he thought the Court would make him join them in one; and the Court did so in the present Case.

Hawkes and Tomson.

When an Action of Debt is brought upon a Judgment, how far the Court will stay the Proceedings in it, on Payment of Principal, Interest and Costs.

Serjeant Girdler moved to bring Principal, Interest and Costs, into Court in an Action of Debt upon a Judgment, and the Proceedings may be staid. And he said, he had known this done in Dr. Burgess's Case in my Lord Chief Justice Holt's Time, and several others. The Court said, they had allowed these Motions in an Action of Debt of Rent, and they should go as far in these Cases as the Rules of the Court would any Ways allow them, so made a Rule to shew Cause: And no Cause being shewn, it was afterwards made absolute.

Gilbert and Billingsley.

How far the Court will stay the Proceedings in a Scire facias against Bail.

MR. Reeves moved to make a Rule absolute for staying Proceedings against Bail. His first Exception to the Proceedings was, that the Scire facias was served the Day it was returnable. Another was, that the Bail surrendered the Principal before the Return of the Scire facias. A third Exception taken was, for the Writ's not being left in the Office four Days before the Return of it. Mr. Reeves farther said, that the Proceedings were after Notice of the Allowance of a Writ of Error. And the last Exception was, that the Scire facias was directed to the Sheriffs of London, whereas it ought have been directed to the Sheriffs of Middlesex, as the Recognisance was of that County. Mr. Strange was Counsel of the other Side, and first he said, in general, that this Application was too early, because the Bail have yet received no real Injury; and the Complaint is only, because he is afraid there may be Reason for it. But then he went on, and gave an Answer to the Exceptions in Order. And to the first he said, that the Service was regular, and that was determined in the Case of Obrian and Frasier, Mich. 12 Geo. 1.

To the second he observed, that the Surrender was at a Judge's Chamber, and not till the Court was up; whereas the Effect of the Writ was determined by the Rising of the Court, and therefore the Surrender was too late. To the Third he said, that it is true, where the Plaintiff only intends to have two Nihil's return'd, the Practice of the Court does require the Writ's being left in the Office four Days in order that the Bail may have reasonable Notice; but here the Bail are returned warned, and therefore that Circumstance cannot be necessary. Then as to the Objection about the Writ of Error, he said, that the Plaintiff in Error ought to have given Bail to it according to the Statute of 3 Jac. 1. cap. 8. whereas he did not, and therefore the Writ of Error could be no Stop to their Proceedings. And to the last he took Notice, that this was a Recognizance entred into at a Judge's Chamber in London, and therefore the Scire facias may be well directed to the Sheriffs there according to the Case in Hob. 195. To the two last Answers Mr. Reeves replied, that as to the Writ of Error, it was not within the Statute; for the Statute speaks only of such Actions of Debt upon Bond, where the Condition is for the Payment of a Sum certain; but the Condition of the Bond in the present Case is the Performance of Covenants. And as to the Recognizance he said, there was a Difference between those taken by the Judges of this Court, and those taken by the Judges of the Common Pleas; for here the Practice is, that a Recognizance taken by a Judge at his Chambers is entered upon the Roll as a Recognizance taken by the Court; but Recognizances taken by the Judges of the Common Pleas at their Chambers are entred as Recognizances taken by them; and therefore in those Cases, he admitted the Scire facias was to be directed to the Sheriffs of London, but not in the present one. And to this Purpose he relied upon the Case in Salk. 659. The Court then gave their Reasons to shew the other Answers were not sufficient. And as to the general Objection of Mr. Strange they observed, that it was the constant Rule to allow Bail to complain, as soon as there are any irregular Steps taken in the Proceedings. To the first Objection they said, it did not signify, though the Service was regular; for the second Objection clearly makes the whole bad. And they said it was true, that all the Judges but the Puisney one left the Court before the Surrender; but they said, that Judge was sitting at the Time the Bail surrendered the Principal at Judge Reynolds's Chambers; and therefore the whole Proceedings were after that irregular. And as to the Third, Judge Page said, he thought there was as much Reason for the Scire facias's being left four Days in the Office, where the Party is returned warned, as where two Nihil's are returned. And so the Court stayed the Proceedings.

Note; Mr. Strange made another Observation, that the Plaintiff is strictly intitled to proceed against the Bail at any Time after a Writ of Error, tho' the Court out of Indulgence indeed stays the Proceedings upon the Bail's giving Judgment upon the Scire facias, to stand for a Security, that they bring in the Principal within four Days after the Judgment affirmed.

Jones

Jones and Mason.

Vide ante
114. S. C.

Serjeant Baynes came now and informed the Court, that these Actions were first of all of different Terms; one of Trinity, the other of Michaelmas. The Declaration of Trinity was faulty, and so; that there was a Demurrer; and thereupon the Court on Motion gave Leave it should be amended, and then it became a new Declaration and happened to be of the same Term with the other. Upon which he moved the Court, that they would not allow of these Actions to be joined in one, but upon new Bail being given, equivalent to both the Causes of Action. The Court said, this was a reasonable Proposition, and must be the Practice of the Court in all these Applications to join different Causes of Action in one; accordingly discharged their first Rule, unless the other Side would consent to do this on Friday.

Barker and Merryfeild.

How far the Court will set aside an Execution in an Ejectment, by Reason of a Defect in the Notice annex'd to the Declaration.

MR. Marsh moved to set aside a Judgment and a Writ of Possession; because the Notice of the Delivery of the Possession, which was annexed to the Bottom of the Declaration, was signed by the nominal Plaintiff, and not by the casual Ejector. And he said the Defendant's Attorney gave the Plaintiff's Notice of this, and took out a Summons before a Judge, notwithstanding which he proceeded. But the Court (Judge Raymond absent) were of Opinion it was well enough; because the casual Ejector is a fictitious Person, and the Notice itself is the Substance. But however, upon Mr. Marsh's saying, he believ'd there was a Case expressly of his Side, they gave him Leave to move it again, if he should find it. And upon his informing the Court afterwards, it was that of Holdfast and Pedigree, Easter 13 Geo. 1. they accordingly set the Judgment aside.

Anonymus.

How far the Court will not grant an Information against a Justice of Peace, notwithstanding he has in some Measure mixed his Authority of a Justice with his Business as an Attorney.

AN Information was moved for against one Morgan, a Justice of Peace and an Attorney too, for exercising his Authority in an illegal Manner, upon a Reference to him of a Civil Right. The Case was, that one Sir Charles Floyd had a Mind to make up his Accounts with his Steward, and accordingly directed him to go to Mr. Morgan, and settle them before him. Morgan presently orders him to swear to his Accounts, and after that was done, demands of him his Vouchers, and locked them up; then immediately kick's him out of the House, and after sends for him back again with a Warrant for a Forceful Entry. But however (the Chief Justice absent) the Court said, that they did not see, that any of these Charges made an Information requisite. To the Second, Judge Reynolds said, that if this Matter of Account had been depending here, they should certainly

certainly make him deliver the Vouchers up; but as it is, he thought an Application in Chancery was the properest Remedy. To the first too Judge Page made something of the same Observation. It, said he, a Justice of Peace should take an Affidavit of a Witness in a Cause depending here, in order to confront him at the Trial, this Court would certainly take Notice of him in this Way; but as this Case is, he said indeed, it was what the Justice ought not to have done; but yet as it was a Thing that is pretty common, he thought an Application of this Sort was too severe. And Judge Reynolds said, this is something of the same Nature, as if a Justice of Peace should make a Warrant for a Man without an Oath, such a Proceeding would not be within the Bounds of his Authority but yet hardly reprobable in this Way. Then as to the Battery, the Court said, it was one only of the common Sort. And to the last Charge against him, they said, they could not enter into the Reasons for his doing this; for it was a Matter properly within his Authority, and there were no positive Facts laid before them to make them think he had abused it. Accordingly they rejected the Motion.

Grandey and Wiltshire.

MR. Gapper moved, that the Master might be directed to tax full Costs in this Case; for he said, this was an Action of Trespass for a very great Detriment and Spoiling of the Plaintiff's Land; and therefore though the Damages given were under 40 s. it was not within the Statute of 22 & 23 Car. 2. 9. Sect. the last. But the Court said, an Asportation was out of that Statute, but not a Spoliation. And Judge Page said, that the Courts have given Discouragement to Suits of this Nature. For upon the Statute of 43 Eliz. 6. if the Judge certifies the Suit to be Veracious, though the Damages are above 40 s. they will not allow the Party his full Costs. Indeed he said, if the Plaintiff had produced a Certificate from the Judge of the Trespass being wilful and malicious, they would have granted it. This is required by 8 & 9 W. 3. 10.

How far the Plaintiff shall recover no more Costs than Damages by Reason that the Damages are under 40s.

Bobington and Parry.

IN an Action of Trover for several Goods Mr. Agar moved to bring a Laced Head into Court, or else the Money it had been appraised at. But the Court said, they never allow Goods to be brought into Court; and they could not allow of the Motion.

How far Goods can be brought into Court in an Action of Trover.

Anonymus.

How far the
Ecclesiasti-
cal Court
has a Right
to hold Plea
in Matters of
Slander.

A Prohibition was prayed to be directed to the Consistory Court of Ely for holding Plea in these Words, you are a Jilt and Strumpet. But the Court said it has been determined, that they may hold Plea for Words of calling a Man a Cuckold; for giving a Man that Name is by Implication calling his Wife a Whore. And in the present Case, they said, the Word Strumpet signifies a Whore and more; so refused the Motion. 2 Lev. 66. 1 Cro. 111. Salk. 207, 552, 692.

Wilson & al' and Poulter,

Vide ante 77.

THIS was an Action of Trover brought by the Plaintiff as Assignee of a Commission of Bankruptcy. There were two Counts in the Declaration; one for 1000l. which the Jury gave the Plaintiff a general Verdict upon; the other for 3080l. which the Defendant was charged with receiving from the Bankrupt's Wife. And as to that a Point of Law was reserved upon the Trial for the Opinion of the Court. It was the same that was before stated, and it was only then put off, that a Case might be drawn up in a proper Manner. But before the Court entered into the Question, they seemed to think the Case was stated so, that it would be to no Purpose to enter into it; because the Plaintiff claims as Assignee of an Assignee of the Commission; which he cannot do, because he claims a Chose in Action; and though the Statute of Bankruptcy allow of such an Assignment to one Person, yet they have not alter'd the Law as to any after Assignments. But Mr. Parker informed the Court, that he sat as Commissioner at the Time of this Translation, and the Case was only stated imperfectly; for he said, the Truth was, that the first Assignment was only for a particular Purpose, that the Goods of the Bankrupt might be secured and got together, and therefore that could be no Hindrance to the general Assignment, which was afterwards, and which the first Assignee and the Commissioners joined in. And upon this the Court ordered the Counsel now to go on to the Question before them. Serjeant Darnel for the Plaintiff said, that he should consider it in two different Lights. The first should be upon a Supposition, that the Defendant knew of the Act of Bankruptcy at the Time he received the Money, and if so, he said, it was pretty clear, that here was a Conversion, which would charge the Defendant, because it was an Intermeddling with the Bankrupt's Goods. Now to support this Supposition, he said, the Evidence upon the Trial was that the Defendant's Brother, the Bankrupt, surrendered himself into the King's Bench upon a Judgment; which was the Act, that made him a Bankrupt; and the Defendant was Security for him, that he should keep the Rules of the Prison; which was the Act, that made him privy to it. And the Conversion, which he is charged with, was a Conversion afterwards. But however the second Light, which he would consider this Matter in, he said should be upon an Admission, that he was not

not privy to it. And as to that he said, that this Act of the Wife could prejudice the Assignees no more than it would the Husband; and he said, there were as strong Cases as this at the Common Law to shew the Weakness of the Wife's Authority over the Effects of her Husband. To this purpose a Case in 2 Cro. 2, 617. was cited, and one in last Term, Sater against Goding. There a Feme Covert wanted to borrow a Sum of Money upon her Husband's Plate, who was a Bankrupt, and accordingly carried it to a Friend of hers to take up Money upon it. Her Friend pawn'd it for 50 l. and paid her the Money; yet it was held the Assignees might bring Trover. So in Case a Woman loses Money at Play, the Husband may recover it in this Action. 1 Sid. 422. And the same in that Case is of an Infant, he may bring Trover, though he cannot have an Action for Money received to his Use. To the first of these Points the Chief Justice said, that the Defendant's Privy to the Act of Bankruptcy was by no Means proved at the Trial; for the Surrender is not an Act of Bankruptcy, though an Escape is by 27 Jac. 1. 19. But Judge Reynolds and Probyn said, that if that had been proved, they should have thought this had been a Conversion; for the Money is changed into Things of an intire different Nature from what it was; for Bank and East-India Bonds are a Sort of Property intirely fluctuating, some Time at one Value and some Time at another, but Money is of a settled Nature. So that the Property is intirely altered. And Judge Reynolds said, it was like the Case of a Bankrupt's Servant bringing another a Sum of his Master's Money, and desiring him to buy a Horse for him. The Horse is bought accordingly, this is clearly a Conversion, provided he knew of the Bankruptcy, though he gets no Profit by it whatever. And as to the second Point, they thought it would be a hard Case to charge the Defendant with this Money, who acted merely as a Broker. But however they said, be that as it would, the Plaintiffs cannot recover upon the second Count; for it appears by the Case, that they sold Part of the Bonds, and by that they affirmed the Contract in Part, which was an Affirmance of it in the whole; so that they ought to have brought their Action for the other remaining Notes only. Upon which Serjeant Darnel made the Defendant an Offer to try the whole over again, provided the Court would give him Leave to add a new Count, as to these remaining Bonds. But not getting the Consent of the other Side, they said, they could not do it. Upon that he made another Request to the Court, that they would give Leave for a new Trial upon this second Count and not upon the other. But the Court telling him, that was not within their Rules neither, he prayed their Judgment upon the first Count, with Costs, which they immediately gave him.

Note; The Case of Sater and Goding, as it stands, is directly the present Case. But the Court said, that they remembred the Wife's Friend gave his own Note for the Payment of the Money; so that he by that Act made the Goods in a Manner his own Pledge, and therefore that Act was manifestly a Conversion.

Lewis and Lewis.

The Remedy
in Case of
Embracery.

THIS was a Writ of Error upon a Judgment in an Action for Embracery given in the Grand Sessions of Anglesey in the Principality of Wales. The Foundation of the Action was the Defendant's tampering with the Jury, to persuade them to give a Verdict for him on Action brought by him against the present Plaintiff for Words; and the Occasion of bringing it was owing to the Plaintiff's not being able to have any other Remedy in Wales. For the Plaintiff had got the Defendant indicted for this in England before, and was found not guilty; so that in any other Indictment, he would plead *autrefois acquit*. Serjeant Whitaker said, that this Action was a little hard upon that Account. He observed too, that though a private Remedy should lie for this Offence, yet it was an Offence, so very injurious to the Publick, and of so ill an Example, that at least the King ought to have joined in the Suit with the Party immediately suffering. But he submitted it to the Court, that no private Action would lie, as this Case is. For it does not appear by the Declaration, that any more Damages were by this means given, than what otherwise would have been given. The Chief Justice said, that he thought an express Charge of that Sort would be extraordinary in a Suit of this Nature; for by that Means the Truth of Verdicts would be called in Question in a different Manner from what the Law prescribes. Accordingly the Court seem'd inclinable to reverse the Judgment, though after a Verdict. But it stood over.

Ellison and Lynn.

How far the
Court will a-
mend a Writ
of Error
within 5 Geo.
1. 13. with-
out making a
Rule to
shew Cause.

IN a Writ of Error the general Errors were assign'd, but not verified. Mr. Parker desired therefore that the Judgment might be affirmed. But however, he said, he ought to inform the Court first, that the Plaintiff in Error had made a Variance between the Writ of Error and the Record brought up; and therefore he prayed at first of all it might be amended upon 5 Geo. 1. 13. though before that Statute the Court could have only quashed it. Judge Reynolds made a Doubt, whether they should do it immediately, or whether they ought not rather to make a Rule for doing it, unless Cause. For he said the Record produced, which the Defendant would amend by, is only a Transcript of the Roll below, and therefore possibly the Original Record may be agreeable to the Writ of Error. But however at last the Court all agreed to amend it immediately; for they said, they had done the same in a Case or two before of this Sort; and then affirmed the Judgment.

The King and The Inhabitants of Mansfield.

ON Rule to shew Cause why an Order should not be quash'd, the Exceptions to it were, First, That the Order is of the Removal of a Man and his Wife, and it is not said, that any Complaint was of the Officers belonging to the Place from whence the Removal is. To that it was answered, that the Fact appears to be contrary. Another, that the Order requires the Parish to whom it is directed to receive them or either of them, which it was said, was uncertain; for according as it stands there, the receiving one of them only would be sufficient. But the Court said, that there was Reason for penning it in that Manner; for the Design was, that the Parish should receive one only, if both could not be found to belong to them. A third, that the County is in the Margin only, and not mentioned in the Body of the Order. And this Exception, Mr. Abney said, had been allowed on his Motion in the Case of The King and The Inhabitants of Aydelthorp and some others. Mr. Strange said, in those Cases possibly there was no Reference to the Margin, as here there is. But the Chief Justice seemed to think this Exception fatal, and he mentioned the Case of The King and Austin, in which he thought this had been allowed. Then another Exception was taken, which the whole Court allowed; and that was, that the Statute of 2 H. 5. requires these Sessions to be held at stated Times, and the Feast of St. Thomas the Martyr is one of them; but it appears that this Sessions was not held within a Week after that Day; and though it is said per adjournment, it does not appear to be within the Time. Accordingly the Order was going to be quashed; but Mr. Abney making a Proposal, that the whole Merits might be referred to a Judge of Assize, the Court did nothing in it. Sid. 312. 1 Ven. 116.

What shall
not be said to
be a good
Order of Re-
moval.

Smith and Lutwiche.

THE Plaintiff declared against the Defendant by the Name of Richard Lutwiche. The Defendant pleads that his Name is Lutwiche and not Lutwick. Upon which Mr. Strange moved it might be set aside. Which was done accordingly.

How far the
Court will
set aside a
Plea in A-
batement.

Anonymus.

IN an Action by two Partners for Goods sold and delivered, the Plea in Abatement was, that one of them died pending the Suit. The Court accordingly set it aside; for they said, the Statute of 8 & 9 W. 10. 7. declares that these Suits shall not abate for such Cause; and this is an implicit Disallowance of such Plea.

How far the
Court will
set aside a
Plea of A-
batement.

Dr. Snape and The Bishop of Lincoln.

Vide ante 93.

THE Chief Justice delivered now the Resolution of the Court upon this Case. He said, the principal Matter they relied upon was the same with that in Philips and Berry's Case, 4 Mod. that where-ever a general Visitor is appointed, and his Time for visiting is prescribed to particular stated Times, the Court will always construe that to be understood of his visiting ex officio, and not to hinder his coming in at other Times upon a private Appeal, unless there are direct Negative Words to that Effect. For if it was not for such a Construction, the Body would be left without any Redress in the mean Time. He said too, that the Reason of that Resolution warranted them in another they made, that where-ever a Visitor is appointed only to particular Purposes, and his Time of Visiting confin'd in this Manner, they will always construe it with the Distinction before mentioned. He observed too, that the Bishop in the present Case was general Visitor; for the Words in the Recital in the Statute of Visitation make him so; and the Conclusion reckons up all the Instances, which it can be supposed there may be occasion for exercising this Authority. But tho' it had not, they were yet of Opinion, a certain Number of particular Instances would not have circumscribed the general Jurisdiction before given. And here he thought a proper Rule might be applied, that where particular Words are in the same Sentence, which the general Words are in, they may be construed to abridge the Sense of them; but where they are in distinct Clauses, the second shall only be construed as a loose Enumeration; and especially too in ancient Writings, where perhaps so much Accuracy was not observed as now there is. Then as to the Negative Words so much insisted on, they were of Opinion, they did not at all refer to this Right, which is now claimed, as Visitor; for the Words are quoad alia that what is mentioned as Visitor; but they thought they might well refer to the general Notion, which was at that Time received, of his visiting as Ordinary. The Chief Justice then gave an Answer to some of the main Objections. The first, he took Notice of, was the Provost's being Visitor himself as to some particular Things. But that he observed could not be; for the Bishop has undoubtedly a Right of controuling what he has done, when he comes in upon a general Visitation, and all Visitors are necessarily, in the very Notion of the Words, final Judges. Then as to the Objection about the Oath, he said it was determined that would not bind the Party in Appelford's Case, and in Colworth's cited in that of Philips and Berry. But besides, in the present Case the Oath is far from being general; for it is, that he will not Appeal, when he shall be punished secundum Exigentiam Statutorum. However there is one good Effect that this Oath may have, that if the Appeal be found unjust, it will be good Cause to expel him. For these Reasons, he said, the Court were resolved, that a Consultation should be awarded. Upon which M^r. Harding, as Counsel for the Bishop said, he did not know, but it might be proper

to move for Costs. But the Court observed, that they could not give Costs, but where some Act of Parliament has allowed them. And then Mr. Strange said, that the Statute of King William does give Costs on Demurrer in Prohibition. Upon which the Court told them, that if so, they had a Right to them without making this Application.

Anonymus.

Serjeant Darnel moved for a Mandamus to be directed to the Mayor and Aldermen of the City of London, to restore one Edmund Turner to the Office of Woodward; because it is an Office in which he had a Freehold. But the Court said, that that Reason would not do, unless the Office was of a Publick Nature. And then an Affidavit was read, which affirmed it to be a publick Office. But the Court said, that would not do neither; for it is necessary, that the Affidavit should set forth some particular Marks to shew it is such an Office. And Judge Reynolds took a Difference between such Offices, which are Parts of the Corporation, and concern the publick Government of the Body, and those that are only Beneficial Offices, belonging to the Corporation. And accordingly they told him, he must move it again.

How far a Mandamus cannot be granted for the restoring an Officer.

The King and Mauseley and Syms.

ON Rule to shew Cause, why an Information should not go against the Defendants for an inhuman Assault; the Counsel produced Affidavits of the Parties themselves, by which they positively denied, they had any Hand in it; and likewise Affidavits of other indifferent Persons, by which it appeared they could not have committed it in Point of Time and Place. But Judge Reynolds said, that Circumstances of Time and Place are not so very material in Cases of this Nature; for the Injury the Prosecutor received, might very well occasion his being not so exact in these Particulars. And the Court said, the Assault is very outrageous; for it is the cutting a Man's Throat, and leaving him for dead, merely out of Malice; and therefore they thought the Rule ought to be absolute, that the Offence may be tried.

How far the Court will grant an Information for a Battery.

The King and Johnson.

THE Prisoner was now tried at the Bar upon the Indictment of High Treason. The Charge against him was for filing and washing the current Coin of the Kingdom against the Form of the Statute 5 Eliz. II. The Evidence of one Kelly was the principal Testimony on which the Counsel for the King relied. And against his Evidence being allowed at all the Prisoner objected, that he was already convicted for uttering false Money, knowing it to be so; which was an Offence so very prejudicial to publick Credit, that his Testimony never ought to be admitted in publick Prosecutions. And his Counsel being admitted to speak to this Point, they said, they

Vide ante 79, 90, 91, 102, 111.

they relied upon the Authority of Co. Lit. 61. But the Court said, the Offences there mentioned are chiefly such as bring Scandal and Contempt upon the Persons, committing them; and the Reason, which that Rule is founded upon, is that *quæ sunt minoris Culpæ sunt majoris Infamiæ*. But in the present Case, they said, the Judgment is only, that he shall be fined and imprisoned for what he did, and nothing of an infamous Punishment. Upon which the Court allowed of his Testimony; and then he gave full Evidence against the Prisoner. The Attorney General then went on and laid before the Jury several Circumstances in Corroboration of this Witness. And one was, that an Information had been made before a Justice of Peace by this Person of the Prisoner's being guilty of this Crime; and upon that a Warrant was made to seize the Tools and other Instruments, which might be found for this Purpose; Gold-Dust, and a File, he said, were found in his Lodgings; and yet he made a Letter of Attorney to one of the Persons that seized them and to another, to gather in his Effects, by Virtue of which Authority, these very Things were got up again; for if the Justice of Peace, who kept them in his Possession, had not delivered them up, he was threatened to be sued. But the Court said, they could not allow of this to be given in Evidence; unless the Prisoner had given the Attorney particular Directions to take these particular Goods. For they said, in Civil Cases, they do indeed allow of a General Letter of Attorney being good Evidence of the Attorney's acting by Force of it. But in Criminal Cases, this would be a dangerous Proposition; that a Person that receives an Authority from another shall be able to charge the Person criminally, from whom he receives it. The Prisoner then entered upon his Evidence; and what he relied upon was, that the only Witness, in a Manner against him, was a Person of that profligate Character, as he was not to be believed; and that he had declared several Times before a great many Witnesses, that he had nothing of Truth to charge the Prisoner with; but yet that he would do it, because by doing it, he was promised his Liberty. To this the Attorney General, by way of Reply, desired Leave to lay before the Court the Information mentioned before; by which it would appear, how incredible it was, that a Person who had given this Information upon Oath some Time before, should afterwards deny that he knew any Thing of the Matter in the Presence of several indifferent Persons. Judge Page thought that this Evidence was very material and necessary; for the Evidence for the Prisoner could by no Means so effectually be taken off by a direct Negative Oath to the contrary. And he said, if the Case had been, that the Evidence had sworn that Kelly own'd this to be a new trump'd up Story about a Month ago, it was evident, the Court would allow of this Information to be given in Evidence, if it could appear by the Date of it to be given a Twelve-Month. But the three other Judges were of a different Opinion; for they said, it was a constant Rule of Evidence in High Treason, never to allow of these Informations to be produced upon the Trial. For as this is a Crime of the highest Nature the Law knows of, it will not allow of

Evidence to be given, that the Party has been accused of this Offence; but requires, that he shall now be accused of it. Accordingly they would not allow of this Matter to be given in Evidence; but yet, they said, the Counsel for the King might call again their Principal Evidence, and examine him to this Point *viva voce*, whether he did make such a Confession, or not. Upon this whole Matter the Court left the Circumstances to the Consideration of the Jury, and they brought him in Not guilty.

Baldwin and Morgan.

ON Rule to shew Cause, why it should not be referred to the Master, to see how much the Plaintiff had received from the Bail, more than he ought, the Counsel said, that they were willing to restore what they had received upon the Execution more than their due, provided they might be allowed Costs upon the Scire facias against the Bail. And Mr. Strange said, that Costs were in this Case allowable; for there was a much stronger one than this in the late Queen's Time, that of *Wale and Josling*; where the Court was of Opinion, that upon a Defendant's Pleading a bad Plea in the Common Pleas, and Judgment, given for him, reversed upon that Account; the Bail to the second Action should pay the Costs the Defendant put the Plaintiff to in the first; and otherwise they refused to stay the Proceedings. But the Chief Just. and J. Reynolds said, that they thought it a pretty extraordinary Case. And in the principal Question the whole Court agreed, that no Costs were to be paid upon the Scire facias as this Case is, because the Bail did not appear to it. And this Difference between where they do appear to it, and where not, they said, was warranted by the Statute of 8 & 9 Will. 3. cap. 10. Then another Thing was mentioned by the Counsel, that at least in Equity and good Conscience the Bail ought to pay Costs; and therefore this Court would not indulge them with this summary Method of Proceeding, but Leave them to their Action at Law, without they would make an Allowance for them. But the Court said, that the Bail's having Restitution of the Overplus was what by Law they were intitled to. And they did not know, that in any Case they required Costs to be allowed, but where a Statute has given them. Accordingly upon the Court delivering their Opinion in this Manner, the Plaintiff's Counsel said, they would pay them back the Overplus, without deducting the Costs. Upon this the Rule was not made absolute.

Note; The Court said, they did not know but this Case might have been different, if it had been upon a Recognisance in the Common Pleas, and the Execution had been only for so much as was recovered; there they thought the Court might allow Costs to be given upon the Scire facias in any Case, where they would not make up the Sum recovered more than the Recognisance. Because a Court of Equity would hinder a Plaintiff recovering more than the Judgment; and yet they would certainly allow Costs there. But in the present Case they said Equity would give no Costs.

How far
Costs are al-
lowable or
not upon a
Scire facias
against Bail.

The King *and* The Mayor, Bailiffs and Commonalty of Exeter.

AFFIDAVITS being now produced, that the Banks of the River were much out of Repair, and that it would be very mischievous if there was not some speedy Relief given, the Court made the Rule absolute.

Anonymus.

How far the Court will grant, or not, an Information for a Cheat.

ONE Cosins had had a Note given him, but it was upon a certain Condition; he brings an Action upon it against the Indorsee; and tears off the Condition. Upon which an Information was moved for against him for this Fraud. And the Court made a Rule to shew Cause.

Goodchild *and* Cayward.

MR. Fazakerly came now to shew Cause, why the Writ of Execution should not be set aside against the Bail. And the Court was of Opinion with him, that the Execution was regular. For they said, it was clear, that Debt would lie upon this Recognisance; and in such Action they did not see, but there must be the same Remedy, as in other Actions of Debt; and consequently if this had been the Case, that Debt had been brought, they could not see, but the Body of the Bail would be liable to Execution. Then they observed, that the taking this immediate Remedy upon the Recognisance can make no Difference. Especially too as the constant Practice has been to allow Executions against the Body upon these Recognisances in Writs of Error, they thought it was pretty clear, that the Execution was right. Upon which Mr. Strange made two other Objections against the Regularity of this Execution. One was that the Judgment against the Principal was above a Twelve-month before Proceedings against the Bail, and yet it was not reversed by any Scire facias. To this the Court answered, that here had been Proceedings against the Principal by Fieri facias's immediately after Judgment, and so it appeared by several of them, that were brought into Court. He then said, that these Fieri facias's might have been taken out not above two or three Days ago; and besides here are no Continuances entered up since the Judgment. Upon which the Court observed, that the Plaintiff might file them when he would; and to the other, the Plaintiff might enter them up whenever he pleased. And this they said, had been allowed even after a Writ of Error brought. The second Objection was, that the Capias against the Bail was marked for 25 l. only, and yet the Plaintiff had levied 29 l. The Court said, that must go before the Master.

Grandey and Wiltshire.

THE Counsel moved this Case again, which is before in Page 117. and he said the Count, he relied upon, was that which charges the Defendant with spoiling unam struem, Anglice a Day-rick. Now this does not appear to be annexed to the Freehold, but only a personal Chattel, which stood upon the Ground, and full Costs are always allowed in such Cases. The Court seemed to think the Distinction was right. But they doubted, whether strues was a proper Latin *U* for a Day-rick; for it signifies a Bundle in general, and not a Bundle of Hay; *Vide ante* but strues sceni is the proper Expression. Upon this it stood over. 117.

The King and Pensfax.

ON Rule to shew Cause, why an Indictment should not be quash'd, two Exceptions were taken to it. One, that it was upon the Stat. of 1 Jac. 1. cap. 17. for making Caps and Hats not having served an Apprenticeship; whereas the Statute creates a new Offence, and appoints certain particular Remedies, of which this is not one; and therefore it is not allowable. The other, that the Statute of 21 Jac. 1. cap. 4. requires all Prosecutions upon Penal Statutes to be brought in the true County; whereas this was brought in Middlesex, and the Cause of it arose in London; and the King's Bench is no more privileged in these Cases, than other Courts. To this Purpose the Cases of the King and Gall, and the King and Hicks, 1 Salk. were relied on. Both these Exceptions were allowed by the Court, and so the Indictment was quashed.

What shall not be said to be a good Indictment upon 1 Jac. 1. c. 17.

Bret and Hillars.

IN a Writ of Error upon a Judgment in the Common Pleas, Exception was taken to the Declaration, for that the Defendant's Name was used instead of the Plaintiff's in the principal Part of it; for as it stands there, the Benefit is said to be to the Plaintiff, and not the Defendant, and yet that the Defendant promised. The Court said, as this is only Robertus instead of Rogerus, and it is Right in the other Parts of the Declaration, it is helped by the Statute of 16 & 17 Car. 2. cap. 8. *Vide* Sid. 49. 6 Mod. 265. 1 Salk. 24. 1 Mod. 42. Salk. 324. N. B. 1. 322. Skin. 591. 2 Cro. 586.

How far a Defect in a Declaration shall be said to be cured after a Verdict by 16 & 17 Car. 2. cap. 8.

Anonymus.

THE Copy of the Issue was left in this Case with the Defendant's Wife; and the Plaintiff's Attorney signed Judgment, because it was not paid for in Time. The Court said, that this was a Snap; so set the Judgment aside. And they seemed to think, that they should have done the same, if it had been left with

How far a Person cannot sign Judgment for not paying for the Copy of the Issue.

with the Defendant himself: And in Michaelmas-Term after the Court declared, that a Service upon the Party himself is irregular; but it must be upon his Attorney.

Goodright and Hart.

How far in Ejectment 'tis not necessary, that Issue should be join'd before a Trial at Bar can be moved for.

ON Motion that the Defendants in Ejectment might appear and plead instant; Mr. Fazakerly said, that the Reason for making it was, that by this Means they might go to Issue presently; and so move for a Trial at Bar this Term, in order that it may come on the next. But the Court said, in Ejectments it is never necessary, that Issue should be joined before a Motion for a Trial at Bar; though in all other Cases it is.

Hemry and Berklet.

What shall be a good Declaration upon a promissory Note, notwithstanding the Omission of laying a Venue in some Parts of it.

IN Error upon a Judgment in the Court of Litchfield, Mr. Parker took two Exceptions; one was to the first Count, for its being upon a promissory Note for Value received, and yet no Venue laid where the Value was received; the other was to the second Count, for its being upon a Computasset, and yet no Venue laid, where the several Items of the Account arose; whereas, he said, that was necessary to be set forth, in order that there might be a Consideration shewn for this Action. The first Objection was easily got over; because it would have been a Variance to have lain the Note in any other Way. And to the other the Court observed, that nothing is necessary to be set forth in a Declaration, but what is the Cause of the Action; and the Cause of an Action is that which is necessary to be produced in Evidence upon a Trial. Now here they said, the Cause of Action is the stated Account; and that is of itself a sufficient Consideration to found an Assumpsit upon; and the several Items of it are of no manner of use in such Case upon this Action. And Judge Reynolds observed, that an Account admitted does not only carry with it a Consideration for a new Assumpsit, but likewise extinguishes the Remedy, that lay upon the Account before. Accordingly they affirmed the Judgment. Salk. 208.

Stephens and Houghton.

How far an Avowry shall be good, which is made upon a Distress for an Amercement.

IN Replevin the Defendant avowed for a Distress taken upon an Amercement in a Court-Leet in a Presentment for making and selling Bread, not having sufficient Weight. Several Exceptions were now taken to the Avowry. First, for that two Courts-Leet were set out in the Avowry to be in one Year, and yet another Court was laid to be per Adjournamentum in that Year, whereas but two Courts-Leet only can be in one Year; indeed the Counsel said the Adjournment was laid to be secundum consuetudinem; but that was not full enough. A Second was

was, Admitting the first Exception not to be good, that yet the Court by Adjournment must have Relation to the Day on which the first Court was held, whereas one of the Offences for which the Abowry is, is laid to be after the first Court. A third Exception was, that 'tis laid that the Jury set the Amercement, whereas they could only affect it. A Fourth, that it was only set out, quod presentatum fuit, that the Plaintiff did the Offence, without averring that he really did it. And to this Purpose Salk. 107. was cited. The last was, that one Distress is taken for three Amercements, whereas the Distresses ought to have been several; for otherwise, if any of the Amercements should not be good, the Plaintiff could not have a Return of any Part of the Distress. To the first of these Exceptions, Mr. Wynn said, that an Adjournment is incident to every Court, and therefore the Setting out the Adjournment in the Manner as is done is well enough. To the others he desired a Day to give an Answer to them, which the Court accordingly allow'd.

Vide post
S. C.

Anonymus.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against certain Persons for claiming to be Burgeses of the Borough of Christchurch in the County of Southampton; the Attorney General said, that the Foundation of this Rule was, that they had not received the Sacrament, nor taken the Oaths within the Time limited; whereas he observed, that the Burgeses of this Town were only the Freemen of it; and therefore it cannot be requisite for them to go through these Ceremonies; because the several Statutes that relate to these Matters speak only of Offices of Profit or of Trust. The Court were of the same Opinion, and so discharged the Rule. And Judge Reynolds said, in the Cambridge Case, which he was of Counsel in, it was doubted, whether Common-Council Men were within these Statutes, though at last it was determined that they were.

What are such Persons, that are not bound to qualify within the several Statutes.

Spurling and Allen.

A Rule was made upon a Justice of Peace to answer the Matters of an Affidavit, for committing a Prisoner of the King's Bench to the County Gaol. Now his Counsel said, that Complaint was made to the Justice for a Breach of the Peace, and he could not commit him to the King's Bench; and therefore he was obliged to send him to the County-Gaol; and especially too in the present Case, this could not be a Fault in him, because the County-Gaol is within the Rules of the other Prison. But the Court said, that it was true indeed the Justice could not commit the Prisoner to the Marshal; but he might and ought to have charged him in Custody of the Marshal; and this is the common Case in Indiaments. They observed too, that though in general a Person in the Rules of the Prison is considered to be within the Prison itself; yet in this Respect he cannot, because the Justice has taken him from

What Prison a Person is to be committed to.

the Custody of the Marshal, and put him under another; and consequently he is guilty of an Escape. But that the Court said, they had nothing to do with; they were only to consider, that here was a Wrong done in taking a Person out of their Prison; but yet as it appeared to be only a Mistake in Judgment in the Justice, they would not make the Rule absolute. However his Counsel consented to pay the Marshal the Costs he was at in getting his Prisoner again, upon the Marshal's agreeing not to bring an Action of Escape against him.

The King and The Inhabitants of St. Botolph's Aldgate.

What shall
not be said
to be a good
Order of
Removal.

Serjeant Corbet took two Exceptions to an Order of Removal of some Children. One, that their Age was not mentioned. The other, that it was directed to the Overseers, and not said, to the Overseers of the Poor. To the first the Court said, that it does not appear, but the Children may have got a new Settlement to themselves; and this Exception has been often over-ruled. To the other, they said, that there are no other Overseers, but those of the Poor.

The King and The Borough of Plymouth.

Vide ante 81.

Another Mandamus was now moved for of the same Sort with that before; because the Corporation was divided upon the Election they went to in Pursuance of the other Mandamus; so that it had no effect. The other Side said, they should make a Return to the first within a few Days, and therefore there was no Reason for the Court to grant it yet. However they made a Rule to shew Cause; but they said, they could not grant it immediately; as they do in other Mandamus's; because there must be a particular Day put into the Writ to require them to go to an Election on. And afterwards the Court made it absolute.

The King and Roberts.

Vide the Case
of Davie and
Davie, ante
92.

THE Defendant was one of those the Attachment was granted against, in the Case of Davie and Davie; and being now brought up upon it, he moved to be discharged; because the Person, who was immediately injured, was dead. But the Court said, the Offence he was charged with, was not a bare Injury to the Party, but a Contempt to the Court; and therefore not like the Case of a Person bound in Articles of the Peace; for there, when the Person, who prayed the Security, is dead, the ultimate Design of the Recognisance is over. Upon which they ordered him to find Sureties or stand committed. But upon his offering to go before the Master, and the other Side consenting, he was discharged.

Jones and Dale and others.

How far a
Power shall
be said to be
duly executed,
or not.

THIS was an Ejectment. And the Case was, that one Charles Morgan was seised of the Lands in Question in Fee, and levied a Fine of them to the Use of himself in Tail, with

with several Remainders over, reserving to himself a Power of appointing the Residue of the Uses by Deed or Will, so as the same should be sealed and subscribed by him in the Presence of three Witnesses. Now the Jury find, that he did make a Devise of the Lands by his Will, writ with his own Hand, which was sealed in the Presence of three Witnesses; but then it was not subscribed in their Presence; but the Devisor told them he had subscribed the Will himself already (which the Jury find he really had) and so desired them to put their Names to it, which they did. Now the Doubt referred to the Court was, whether this was a good Execution of the Power or not. The Court gave no Resolution in this Case; yet all the Judges gave their several Opinions, that this Power was not well executed. For they said, that the Subscribing in the Presence of the Witnesses seemed to be as essential to the Execution as the Sealing before them. And Judge Reynolds said, that he could not see, how the Devisor's telling the Witnesses, that he had subscribed the Will, could be equivalent to his actual subscribing it in their Presence. Judge Page and Judge Probyn both admitted, that his Writing his Name just under the Will, (according to the proper Import of the word Subscribing) was not necessary; for if it had been put at the Top, on the Side, or on the Back, it would have been all the same. To this Purpose Judge Page cited a Case, which he remembered, where a Man was indicted for forging and indorsing a Note; and it was held by all the Judges in Serjeants Inn, that his erasing a Memorandum which was made in red Letters of Part of the Note paid off, which was at the Bottom of it, though he did not erase the Back of it, was sufficient Evidence to support the Indictment of Forging and Indorsing it. And this was even an Indictment of Felony upon the Statute of 5 Ann. c. 33. These Points seemed to be the main ones, that were mentioned in the Argument of this Case, and so it stood over.

Vide the next
Case.

Jones and Dale.

MR. Fazakerly was now Counsel for the Plaintiff. He divided his Argument into two Parts; one as to the Power itself; the other as to the Execution of it. To the Power, he said, the Words of it were; After the Determination of such Estates I give my Lands to such Person and Persons, as I shall by any Deed or Deeds, Will or Wills sealed and subscribed in the Presence of three Witnesses declare, limit and appoint. Now he observed, that the Intent of the Party was evidently with him; and therefore as the other Side contended for a strict literal Execution of an Authority in order to defeat that Intent, he should contend for a literal Construction of the Authority, in order to support it; especially too as it is the Construction of one over a Person's own Estate. The Construction he mentioned was by making a Break upon the Word subscribed; and so, that the Intent should be, that the Lands should go to such Persons as he should appoint in the Presence of three Witnesses by any Deed or Will sealed and subscribed. Now he observed, that according to this Construction the Power was clearly executed;

Vide the
former Case.

for

for though the Will was not subscribed in the strict derivative Sense of the Word; yet there was a sufficient Assent in Writing given to the Instrument, that it should be his Will, by his attesting it with his own Hand in this Manner, sealed and delivered as the true Will of Charles Morgan, in the Presence of us whose Names are underwritten. And the Writing of his Name itself in the Body of the Will was sufficient. So is 3 Lev. 1. But however, he said, he would follow the Counsel of the other Side in their own Way, and take the Construction of the Power in the same Sense as they contended for; and yet he hoped he should be able to maintain, that the Power was well pursued. For he took Notice, that sealed it was even in the Presence of the Witnesses; subscribed it was, or what fully amounts to being so; and delivered in this Manner before them, as his Last Will and Testament. In Sense therefore, he said, the Power was complied with. And that these over a Man's own Estate need not be so according to the Letter of the Words, he cited several Cases. Littleton's Rep. 23. A Copyholder surrenders to the Use of his Will, so as it be left in the Hands of one Mof. The Will was not left in the Hands of Mof, and yet it was held to be well enough. Mof indeed was dead at the Time of the Making of the Will; but that he conceived could make no Difference; if, as the other Side contend for, Authorities must be taken according to the Words; for he might have Confidence in Mof, and in no other Person, that he would keep his Will securely. A Case too in Skinner 427. he relied upon. There a Man made a Settlement of his Lands, reserving to himself a Power of making Leases, rendering Rent. A Lease was made without any such Render, and yet held good. His last Authority upon this Head was out of Raymond 295. A Man settled his Lands to particular Uses, with Power to revoke them by express Words; he devises the Lands to other Uses, and that was held a good Execution of the Power. These Authorities, he said, were a Proof, that, tho' a Person does not satisfy even the legal Effect of a Power, the Power may in some Cases be well complied with. But in the present one the legal Effect is satisfied; for a Sealing is in Law a Signing, and a Signing is a Subscription. Now that a Sealing does in Law amount to this, he relied upon the first Case in Lev. 3. where Sealing a Deed before three Witnesses is held a Signing it within the Intent of the Statute of Frauds.

Mr. Wills was Counsel for the Defendant. To the first Point he argued, that all Instruments ought to receive a plain and obvious Construction; and to construe the Will in the present Case according to this Rule, must be to require, that the Witnesses should see it subscribed. He said too, that good Reason there might be for a Man's appointing, that an Act of this Sort should be done in so solemn a Manner; for he might know himself to be of a Disposition easy to be persuaded to do Things of a sudden; and therefore he might prudently put such a Law upon himself. To the second Point, he did not much contend, but the Writing of his Name in the Body of the Will might amount to a Subscription; but yet he strongly urged,

urged, that this Writing ought to have been in the Presence of the Witnesses. For the Court is not to consider, whether the Act was done sufficiently deliberate; but the Circumstances of Deliberation, which the Party himself has fixed on, must be regarded. And here he desired to apply one Rule of Distinction, which might reconcile the Books upon this Subject. Wherever a Power, annexed to an Interest, requires the Execution of it by such a particular Instrument, it may well be executed by another Instrument, having the same Operation in Point of Law; but wherever a Power requires the Execution of it by such and such particular Circumstances, those Circumstances must be literally complied with. And good Reason there may be for this Distinction; for in the one Case the Court may be likely to judge what was the Reason for a Man's Tying himself up to such particular Forms; but the other is liable to great Uncertainties. Upon this Distinction, he said, he allowed the Case in Raymond, cited by the other Side, and he applied several others to prove it. Hob. 312. 10 Rep. 143. But especially that of my Lord Bale and Mountague lately resolved by all the Judges. A Power of Revocation my Lord Bale reserved to himself; but provided, that it should be signed by six Witnesses, three of which should be Peers. He went to Jamaica, where there were no Peers; and there made the Deed of Revocation, and got it signed by some of the principal Men of the Island; and yet it was held, that the Authority was not pursued. And there it was said by the Counsel, that my Lord Bale on Purpose put in this Ceremony, because he knew, he should be a good Deal influenced to revoke it, and yet intended that the Revocation should never take Effect; tho' in Appearance it might seem to the contrary. Then to the last Observation mentioned by the other Side, Mr. Wills answered, that subscribing a Will and sealing a Will were Acts in their Nature intirely different; and therefore the one could be no Satisfaction of the other. Accordingly prayed Judgment for the Defendant. But the Court said, they would take some Time to consider of it. 3 Lev. 87. 2 Ven. 218, 350. Salk. 688. 1 Vern. 83. 2 Vern. 69, 339.

Anonymus.

IN a Scire facias on a Judgment it was moved to amend on Payment of Costs, by putting in the Writ Bill instead of Original. The Court said, the proper Motion was to quash it, but refused to amend it.

Dale and Rusted.

ON Motion for the Master's Report, of the Irregularity of a Scire facias upon a Judgment, he said the Case was, that an Executrix, who was the Defendant, gave a Letter of Attorney to confess a Judgment to the Plaintiff; this Judgment was accordingly signed, but never entered upon Record; yet afterwards the Defendant pleaded it in Bar of another Action. And now a Scire facias being taken upon it, the Question was, whether it was regular. Mr. Fazakerly objected, that it was; for the Court has a Power to give the Plaintiff Leave to enter

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When a Scire facias is brought upon a Judgment, how far the Court will not give Leave that it shall be amended.

When a Scire facias is brought upon a Judgment, what shall be said to be such an Irregularity in suing it out as to be a Ground for setting it aside.

it up nunc pro tunc, and he said, they would do that, because the Defendant has already taken Advantage of it. But the Court observed, that the present Matter before them was only the Irregularity of this Scire facias; and clearly it is so, because there is no Judgment on Record to found it upon. Accordingly the Judgment on the Scire facias was set aside. 5 Mod. 88.

Anonymus.

How far the Court of King's Bench will not grant a Prohibition to the Grand Sessions of Wales.

MR. Draper moved for a Prohibition to stay Proceedings in the Great Sessions of Anglesey in the Principality of Wales, upon an Affidavit, that the Defendant Foulkes had not resided in Wales for these three Years last past above ten Days at a Time, nor in this County above four Days, and yet he was sued there in a Personal Action, but never appeared to it, nor was even so much as summoned. He cited a Case in Comberbatch 468. where, he said, the Court had granted a Motion of this Nature. That was an Action even concerning Land; a Bill was brought for the Discovery of a Deed relating to the Title of it; and yet upon such Affidavit, as in the present Case, the Court granted a Prohibition. But the Court took a Difference between Bills of Equity in those Courts, where the Remedy is only upon the Person, and Suits at Law, where the Remedy is likewise upon a Man's Property; for in the first Case, they did admit, that Prohibitions had gone, and that was the Reason for the Case cited; but never in the other. Then as to the Summons, they said, the Affidavit might well be understood of a personal one; and they knew very well, that the Method of Proceeding in those Courts was only by a general one, by sticking up a Notice in Writing, at the Time their Courts are opened, of the Names of the Persons whom Suits are commenced against; so that if the Defendant was in Wales at the Time of this Summons so stuck up, the Proceedings were clearly regular. Accordingly they refused the Motion.

The King and Robinson.

Vide ante 97.

THE Defendant now informed the Court, that he had paid M^r. Chambers 400 l. by Way of Satisfaction of so much of the Execution as the Goods he rescued was subject to; and therefore he moved that he might have a Rule upon the Sheriff to make him a Bill of Sale of these Goods, upon Payment of the Residue of the Money due on the Appraisement. The Court thought this a reasonable Motion, so made a Rule upon the Sheriff and M^r. Chambers, to shew Cause to morrow, why he should not do it. And then they agreed to it.

Grandey and Wilshire.

Vide ante 127.

MR. Gapper now said that he had consulted Littleton's Dictionary; and there he found Strus rendred a Bundle or Heap of any Thing, a How or Rick of Hay, &c. and therefore as it may be used either in a general or particular Sense, the proper Use of the Anglice in this Case was to determine in which of

of the Senses the Party used it. Judge Reynolds said, that this was a proper Rule; but yet in the present Case the Court agreed, that *Strues* was of one only Signification, and signified properly a Heap in general; and accordingly they arrested the Judgment. Vide Sid. 60. Lev. 48.

Serjeant Darnel shewed now to the Court by Affidavit, that this Office was of a publick Nature, and the Business of it was to take Care that the Wood and Coal for the Use of the City of London be kept according to the proper Manner of it; and that he is an Officer, who is admitted by the Mayor and Aldermen of the City of London. He cited too a Precedent in which a Mandamus had been granted in a like Case, to restore a Man to the Office of Master-weigher of the King's Beam; and a Case allowed in *Comberbatch* 347. of the Office of Surveyor of the New-River. Upon these Precedents the Court put it off again to consider of it a little longer. Vide Sid. 169. 2 Sid. 112. Vide ante 123.

Short and Scurry.

THE Defendant obtained a Rule for shewing Cause, why an *Habere facias possessionem* and a *Capias ad Satisfaciendum* should not be quashed. The Exception to both was, that they were returnable *die Martis prox' post Octabis Sancti Hillarii*, which is out of Term. Another Exception too to the *Habere* was, that instead of the Words *Georgius Secundus* it was *Georgius Rex*. Mr. Reeves said as the Gentlemen of the other Side were so sharp in their Exceptions, he should beg Leave to be sharp in an Exception too; and that was to the Tittling of the Affidavits, that they were in a Cause between Short and Scurray, whereas the true one was Short and Scurry. The Court allowed this Exception, and said that no Indictment of Perjury could lie upon these Affidavits, as they are tittled. And they said that *eadem sonantia* could not help it in this Case; and took a Distinction between different Parts of the same Record, and Affidavits in a Record; for in the last Case they will not allow of any Variance or Amendment, as the Punishment of swearing falsely is so severe. Accordingly discharged the Rule. How far an Affidavit shall not be said to be duly tittled.

Hick and Strong.

ONE Andrews had taken Compassion of three Fatherless Children, and brought them up for several Years together, and took Care too of a small Estate that fell to them. One of these Children prov'd dissolute, and assigned her Interest in these Lands to a Rat-catcher; who brought an Ejectment in the Common Pleas to recover it. The Court there made a Rule by Consent, that the Proceedings in the Ejectment should be stayed, and that Andrews should retain the Land to his own Benefit, till he had reimbursed himself to the Value of 140 l. which he had laid out upon them. Notwithstanding which this Rat-catcher brought a new Ejectment in this Court; and therefore Andrews moved the Court to stay the Proceedings, especially How far the Court cannot stay Proceedings in an Ejectment, notwithstanding some Appearance of equitable Circumstances.

especially too as the Plaintiff was in Prison, and therefore taking an Attachment against him would signify nothing. But Judge Page observed, that if the Plaintiff had entered into any Agreement whatsoever not to commence a Suit here, this Court would not have said the Proceedings; for they never do it, but where the Consent was made in a Cause here depending. Accordingly the Chief Justice (absent J. Reynolds and J. Probyn) said, that there was much Equity in the Case; but this Court has no Power to do it.

Shergold and Bostrick.

The Custom
of London
relating to
Executors.

A Habeas Corpus cum causa was directed to the Mayor and Sheriffs of London. The Return to it was, that there is a Custom in the City, that if any Person in his Life-time be indebted to another Person within the City upon simple Contract, he may bring an Action of Debt against the Executor, and that this was the present Case. A Procedendo was now moved for. But M. Agar objected, that the Return was insufficient, both for the Uncertainty of it, and the Unreasonableness of the Custom. To the Uncertainty of it, no Courts are mentioned, where the Action may be brought; and therefore the City Courts have not given themselves a Jurisdiction. And nothing shall be intended to take away the general Relief of the Courts above. To the Unreasonableness of the Custom, he said, in the general Manner as it is returned, it must affect Strangers as well as Citizens; those that have no Benefit from the Body, as well as those that have. And it is not agreeable to Equity, that the Accident of a Contract's being made in a particular Place should subject an Executor to a particular Prejudice. He said too, that this was not the Case of Foreign Attachments; for there one Party must be a Member of the City; and then it is no Hardship, that another's contracting with him should give such other a little Inconvenience. Judge Reynolds and J. Probyn were not in Court, so the Chief Justice said, that it would be proper to move this again, and that Copies of the Return should be delivered to the Judges; but observed, that the Return must not be filed.

Vide post
142.

Wilson and Poulter.

Vide ante
77.

Serjeant Darnel came now and complained to the Court, that the Rule was drawn up by Consent, that the Plaintiff should have the 1000l. upon one Part of the Verdict, which must be intended, that he should have the Benefit of it by taking Execution of it presently; and that was the Foundation which made them willing to relinquish the Hopes of Benefit from the other Part of it; notwithstanding this the Defendant has brought a Writ of Error upon this Judgment, to hinder them of the Benefit even of this Part of the Verdict. For this Reason he hoped that the Court would either make the Defendant discontinue his Writ of Error; or else alter the Rule that was made before. But the Court observed, that you were contented to take Judgment upon this Part of the Verdict as it stood, and

and were afraid to venture the Chance of losing this, in hopes of gaining the other; because you doubted, whether you could prove an Act of Bankruptcy at all; so that it is clear, the Defendant was under no Terms of being confined not to bring a Writ of Error. But because the Court said, that they thought it was fit and reasonable, that the whole should go through another Examination before the Jury, they made a Rule upon both Parties to attend to Morrow.

Vide post
142.

The King and The Inhabitants of Barnstable.

Serjeant Chapel a few Days ago applied to the Court for a Mandamus to be directed to the Overseers of the Poor to make a Rate. The Court then ordered him to look for Precedents. And he now came and informed them, that he had found two, where the Court had granted a Mandamus to make an equal Rate. But that the Court refused to do; because they said, if the Rate should be unequal, the proper Remedy would be to appeal; and therefore the granting such a Mandamus as that would be to take from the Court, which ought to receive Appeals, the Effect of Appealing. And this, they said, was refused upon Debate in Dr. Butler's Case, relating to Sturbridge Fair. But they observed, that they might well grant a Mandamus to make a Rate in general; for this Court is the proper Jurisdiction to make Laws be put in Execution; but then, they said, an Affidavit must be produced that a Rate is wanting; and it then being confessed by the Counsel that the Affidavit only swore, that the Rate made was unequal and partial, the Court said, they could do nothing in it.

How far the Court of King's Bench cannot give Relief in case of an unequal Rate.

Anonymus.

MR. Wills moved for an Information in the Nature of a Quo Warranto against several Persons for acting as Freemen of the City of Gloucester, not residing there at the Time of their Election. The Point on which this Question turned was, whether the Corporation, that is the acting Part of the Body of this City, can make Honorary Freemen. Now, he observed, that no Corporation can do this, unless they have a Prescription or a Clause in their Charter to support them in it. But in the present Case, though indeed they have sometimes complimented Noblemen and others of the first Distinction with this Privilege, yet that was only a Thing conferred at, and can be no Warrant to them in what they have now done, making 119 Strangers Free at one instant. Besides too in this Corporation there are very particular Privileges given to the Freemen, and one above all in being Toll-free throughout the Kingdom; now by the same Way of Reasoning, as they may make 119 Free, they may make every Person in England so, and by this Means take away from the King this Part of the Revenue. But if they should claim any Colour of a Prescription to support them in what they have done from these few and uncommon Instances, the Charter of King Charles the Second which they accepted of, has clearly taken it from them,

How far the Court will not grant an Information in the Nature of a Quo Warranto against Persons for exercising the Power of making Freemen of it.

by incorporating them by the Name of Cives, Residentes & Inhabitantes of this City. But the Court said, that they were of Opinion, that every Corporation may make what Persons they will Free of it, and this is an Incident belonging to them de jure, unless there is a Prescription or express Words in the Charter to the contrary, restraining them in some particular Cases. The Court observed farther, that this Complaint was only of the imprudent Exercise of a Privilege, and not of the Illegality of it; and therefore this Application was not proper. They said too, that the Charter could not make a Difference; for all Incorporations are in this Manner. Accordingly they refused even to make a Rule to shew Cause.

Anonymus.

Within what
Time Offi-
cers of Cor-
porations
must take
the Oaths of
Allegiance.

MR. Reeves moved for a Mandamus to be directed to the late Mayor and Aldermen of Sudbury to go to the Election of a Mayor, in Pursuance of the Statute of 11 Geo. 1. the late Mayor not having taken the Oaths within three Months according to the Statute of 1 Geo. 1. M^r. Reeves said, the late Mayor did indeed offer to take the Oaths at the Sessions for the Town holden within that Time, but the Recorder shewed some Reason then that the Sessions was not held properly, and so the Assembly was dissolved. But at a Sessions held after the three Months he did take them; but that he said was not sufficient. Accordingly the Court made a Rule to shew Cause. And Judge Reynolds made an Observation upon the different Penning of the Statute of 25 Car. 2. and this of 1 Geo. 1. for the Statute of Charles required indeed the Sacrament to be taken within three Months, but then it allowed the Oaths to be taken at the next Term or Sessions after the three Months; but the Statute of 1 Geo. 1. has taken away that Distinction.

The King and The Inhabitants of Abbotslangley.

What shall
be a good
Settlement
within 1 Jac.
2. 17.

Vide post
S. C.

ON Motion to quash an Order of Removal made by two Justices and an Order of Sessions confirming it, the Counsel said, that the Order of Removal was stated specially, that one Crossby took a House and served Parish Offices in the Parish of Aldenham, between the Statute of 1 Jac. 2. 17. and 3 & 4 W. & M. 11. and that the Justices removed him to the Parish of Abbotslangley, being the Place of his former Settlement, adjudging him to have gained no Settlement since. The Exception taken to this Order was, that Aldenham was his last legal Settlement; for his serving Parish Offices there was taken upon the Statute of 1 Jac. to be equivalent to a Notice in Writing. To this Purpose the Case in Carthew 28. was relied on. The Court accordingly made a Rule to shew Cause.

Gutton *and* Hall.

THE Notice of executing a Writ of Inquiry was given generally to be on such a Day, without mentioning the particular Hour. Upon which the Court made a Rule to shew Cause, why it should not be set aside, and said the Proceedings.

The Notice which is requisite to be given of a Writ of Inquiry.

Anonymus.

THE Notice of signing Judgment for want of a Plea was left with the Defendant's Attorney upon a Sunday, which the Counsel said was irregular; and therefore he moved to set aside the Judgment. But the Court said, that this is not within the Statute of Car. 2. though if it had been upon the late Act of Parliament of Iterations Arrests, they admitted it would; for then it would have been in the Nature of Process.

How far notice of signing Judgment may be given on a Sunday.

Champion *and* Scot.

UPON the Reference to the Master to see what was due upon a Bond, he reported that the Defendant was bound as Surety for one Lambart in a Bond of 100 l. which Lambart and he joined in; but after that Lambart gave another Bond solely to the same Person as they gave the other to. Lambart paid the Obligee 20 l. and 30 l. and took two Receipts of him in a general Manner only for Money due upon a Bond. Upon this Report the Court were of Opinion, that this Account was too intricate for the Master to look into, because it was not certain enough to which of these Bonds or in what Proportion these Receipts are to be applied. But they thought this Application more proper for Chancery.

What Matters the Courts of Law will not give Relief in, by Reason that they are more proper for Courts of Equity.

Anonymus.

MR. Wynn moved, that the Sheriff might amend his Return to a Distringas; because he had returned less Issues upon this, than upon a former. But the Court said, they could not do it, as the Interest of a third Person was concern'd; but the proper Method, they said, was to make a Rule upon him to return upon another Distringas double the Issues he had returned upon the former. And Judge Page said, in the Exchequer the Sheriff is not chargeable with these Issues, but the Person distrained.

What Issues are proper to be returned upon a Distringas.

Anonymus.

A Rule was moved for to inspect a Gaoler's publick Books. But the Court said, that the Books of a Gaoler are only private Memorandums, and therefore they could not do it. They said too, that a Gaoler is only a Servant to the Sheriff.

What shall not be said to be publick Books.

riff, and therefore it was not proper for this Court to inter-
pole in it.

The King *and* The Inhabitants of Benjoe.

Vide ante 91.

MR. Lee came now to shew Cause, why the Order should not be quashed. He said, that these Statutes relating to Settlements have always received a benign and liberal Construction. The Statute of 13 & 14 Car. 2. 12. provides, that any Person may be removed from a Parish, he has not resided in for forty Days, unless he has rented there a Tenement of the Yearly Value of 10l. yet it has been held, that a Person having a Freehold of ever so small a Value there, is within the Equity of that Exception. Upon the Statute of 1 Jac. 2. it has been allowed that Service is equivalent to a Notice. And upon that of 3 & 4 W. 3. a Hiring for a Year, and a Service for two half Years, has been held within the Reason of that Act. The Statute too relating to Certificate Persons says, that no Persons shall be obliged to have that Testimonial, who have taken a Tenement of 10l. per Annum, or executed Offices within the Parish; yet a Surrender of a Copyhold to a Man in the Right of his Wife, has been thought sufficient. So likewise the Title to these Freehold or Copyhold Lands has been no more inquired into, than the Right which a Man has held them in; and therefore where a Man wrongfully built a Tenement upon the Lord's Waste, a Descent of that Tenement has been thought a good Qualification; because there's no Way of recovering that, but in a solemn Action. But besides this general Argument to induce the Court to this Opinion, he said, he thought there was something of a closer Proof of it; and that is, that before the Statute of 9 Geo. 1. it is clear, that the very building a House upon his own Land would have gained him a Settlement as well as the Purchase of the Land it self. Now he said, that this Act can, at the most, only take off the Effect of the Purchase, but the Building of the House must have its old Effect remaining. The Court seemed to think, that this Case deserved Consideration; so ordered it to be spoke to again the next Term.

The King *and* Cousins.

Vide ante.
126.

ON Rule to shew Cause, why an Information should not be granted in this Case, Mr. Pazacherly said, that he believed it was pretty uncommon to grant an Information, when a Civil Right is depending; but besides he observed, that he had Affidavits to produce by the Witnesses, that subscribed this Note, that there was no Condition annexed to it at the Time they signed their Names; and that it was by no Means probable, that a Condition should be joined to it afterwards; and likewise he said, he had an Affidavit of the Party himself which directly denied the Fact; so that there was only one Oath against another. But the Court said, if this Action had been brought against the Person, that gave the Note, they should have thought clearly an

In.

Information ought not to go, because he has another way of saving himself from Prejudice, by denying it now to be his Note, and joining Issue upon it; but they did not see the Indorser had any such Relief; because it is not pretended but it was a general Note at the Time he signed it. Accordingly the Court made the Rule absolute.

Goodright and Wood.

ON a Motion for a Trial at Bar, the Court laid down two Rules, that they never grant these Trials merely for the Consequence of the Cause, though it be of ever so great a Value; nor ever for the Length of Examination, where 'tis of a very small Value; and in Elements the Rule has been not to allow them but where the Yearly Value of the Land in Question is 100 l. The Court said likewise that a general Swearing of the Length of a Cause, though there is Value too, will not be sufficient, unless there is a probable Foundation laid for them to believe it.

In what Cases Trials at Bar are proper to be directed.

Anonymus.

ON Rule to shew Cause, why a Rule should not be made upon the Gaoler of the Marshalsea to return a Habeas Corpus, his Counsel said, that the Prisoner was charged in an Action there under the Value of 5 l. and therefore by the Statute of 21 Jac. 1. 23. he is not removable up to the Courts at Westminster. But the Court said, that that Statute was only to be understood, that this Court shall not have Consuance in such Causes, but yet they would always require a Return; otherwise by setting up such a sham Action, their Jurisdiction might in a Manner be defeated. Accordingly they made the Rule absolute.

How far the Court will require a Return to be made to a Habeas Corpus.

Steers and Mitchel.

ONE of the Bail were taken in Execution, and now Execution was had against one of the Defendants; upon which Mr. Strange moved, that he might be discharged. The Court said, there was a very good Remedy for him by Audita Querela; and therefore they would not grant a Superseas, but upon his paying half the Money due upon the Judgment, which, as the Execution was taken only against him and another, he ought to do, but that being not complied with, the Court said, they would not interpose.

How far the Court will leave the Party to take his Remedy by Audita Querela.

Edmund and Thomas.

THE Defendant pleaded his Privilege, that he was an entering Clerk of Sir George Cooke, and made Affidavit, annex'd to his Plea, that he solicited Causes in the Common Pleas. But on Rule to shew Cause, the Court let the Plea aside; for they said, he ought to have sworn, that he entered Causes in the Office, and so shewn, that he did Business in the

How far a Plea of Privilege shall not be said to be well verified by Affidavit.

the Capacity of an Entering Clerk; but the Swearing that he solicits Business in that Court is a Thing of a different Nature.

Wilson and Poulter.

Vide ante
136.

THE Defendant would not consent to any Thing, but insisted upon the Rule as it was drawn up. Upon which the Court said, that in one Respect there is a Mistake in the Rule; for it was pronounced by Consent, but drawn up generally, accordingly they gave Orders, that it should be discharged; for they said, the Truth and Justice of the Case clearly required a new Trial for the whole.

Shergold and Bolstrick.

Vide ante
136.

THIS Case was now argued again. And to the first Exception the Court was of Opinion, that as the Return is, no Procedendo ought to go; for the Custom is set forth generally, that an Action of Debt will lie, which is to be intended in the Courts above, as well as in the City Courts. And it is a Rule, that where-ever these Courts can give as good Relief as the Courts below, they never send a Cause back again. To the other Mr. Moreton answered, that the Cause of Action arose in London, and there are many Cases of this sort, where their Custom will bind Strangers. To this Purpose he cited Rastall's Entries 161. where two Persons were bound Sureties for another in London, a Recovery was had against one of them, and by the Custom he brought his Action to have Contribution against the other; yet neither of those were Free of the City. To the same Purpose was relied on 2 Lev. 166, and 1 Ven. 179, 180. And of this Opinion was all the Court. And then they said, they would give Leave, that the Return might be amended as to the other Exception. But they observed, that then it must not yet be filed. And they took a Distinction too between Certioraries and Habeas Corpus's; for Certioraries bring up the Body of the Record itself; and therefore if they are once filed, the Record cannot go back; but Habeas Corpus's bring up only a Copy of it; and therefore though they are filed a Procedendo may be awarded. Sid. 108. Lev. 93. 1 Ven. 212. Salk. 352.

The King and Hayes.

Vide ante 32.

THE Defendant now moved the Court that he might take Exceptions in Arrest of Judgment. But the Counsel for the King objected, that this Motion ought to have been made long ago, within four Days after the Special Verdict given, or at least within four Days after the Special Verdict perfected, by the Opinion of the Court. To the first Objection, the Court said, this Motion cannot be made till the Verdict is perfected, because till then the Prisoner is not convicted; and to the other they observed, that this Motion is allowable at any Time before Judgment; and therefore as the Judgment was not yet given, they ordered the Defendant's Counsel to go on

on. The first Exception they took was to the Certiorari; that the Indictment was upon the Statute of 5 Eliz. 14. and therefore the Certiorari ought to have been to bring up such an Indictment; but the Certiorari in the present Case is only to bring up an Indictment of Forgery generally. The same Exception was taken too to the Distringas and the other Parts of the Process. And M^r. Masterman reported to the Court, that the Precedents constantly made that Difference; that if the Process is upon an Indictment on a Statute, it concludes *contra formam Statuti*; but if it is an Indictment at Common Law, the Process is general. And though a Day was given to the Counsel for the King to search for Precedents, they could not find one the other Way. But the Court said, that the Certiorari orders the Person, to whom it is directed, to send up *omnia & singula Indictamenta*, and therefore that is clearly good. Then to the Distringas the Form of it is *de quibusdam transgressionibus, Contemptibus, falsi Fabricationi* indictatus existit; and therefore as Forgery is an Offence by Common Law and Statute Law both, they thought it must be well enough, though the Precedents happen to run with that Distinction; but indeed the Chief Justice said, if this Offence had been merely upon the Statute, that might be necessary. But then the Counsel objected farther, that it does not appear but the Prisoner might be charged with several Offences of Forgery; now the Distringas can only concern one, and therefore as it is general it must be intended to relate only to the Forgery at Common Law; so that if it should be admitted that the Certiorari was good, this cannot; for a Certiorari removes up all. But the Court gave one general Answer to this, that Process upon an Indictment shall be intended to be in Pursuance of the Indictment; and besides it does not appear that here are two Indictments. Upon which the Defendant's Counsel said, that they would take one more Exception, and that should be, that no Indictment will lie upon this Statute; for the Remedies the Statute has chalked out by express Words are *Asson, Bill or Information*; and though there are the general Words (or otherwise according to the clear and due Course of the Laws of this Realm) yet they can only intend such Remedy, in which the Judgment mentioned by this Statute can properly be given; now they said, Damages were by no Means proper to be recovered in an Indictment, and therefore an Indictment cannot lie. This Objection the Counsel for the King said would more properly fall upon the Nature of the Judgment they should pray; for if they did not pray Damages, there would be nothing in it. But however they said, they did pray Damages and Costs too, and yet they had the Indictment was proper. For as to the Damages, they said, the Jury ought to have given them; and this Defect of the Jury may be supplied by a Writ of Inquiry; and as to the Costs they said, the Master might tax them. But the Court said that they did not know in any Case, where they could not be given by the first Jury, Damages could be perfected by a Writ of Inquiry; and therefore they thought clearly Damages could not be given upon this Indictment. The same they thought too of Costs; for Costs shall not be given, but where Damages may. Then as to the Indictment itself, the Court

said

said, in this Clause of the Statute where the Punishment is appointed, there are the Words (by any of the Ways or Means aforesaid) now the Ways and Means are Action, &c. before mentioned, and they thought the general Words included the Indictment, provided Damages and Costs were not insisted on. However the Counsel for the King were for considering of this a little longer; but the Court informing them the Prisoner would still have Time to move in Arrest of Judgment, they prayed Judgment presently. Accordingly Mr. Justice Page pronounced, that the Defendant should stand upon the Pillory at Charing-Cross, have one of his Ears cut off whole, and be imprisoned for a Twelve Month. And after the Chief Justice said, he did not know, but the Prosecutor might still bring his Action for the Damages.

Anonymus.

How far the Court will not direct a View in an Indictment.

MR. King moved for a View in an Indictment of Trespass; but the Court said they did not think this was within the Statute; so they refused the Motion, as it was at the Suit of a private Prosecutor; though if the Suit had been carried on at the Expence of the King they would have done it. Vide 4 Ann. cap. 16. sect. 8.

Bagwell and Jobson.

Vide the next Case.

THE Plaintiff brought an Action of Debt upon a Bond, with a Condition for the Payment of a Bill of Law-Charges. And upon this the Defendant moved, that the Bill might be taxed. But upon the Conditions being read, and it seeming to be a special Condition of a particular Agreement between the Parties, the Court doubted, whether it could be done; but however made a Rule to shew Cause.

Bagwell and Jobson.

Vide the Case before.
How far the Court will direct or not, that an Attorney's Bill shall be taxed when a Security is given for the Payment of the Money.

MR. Lee came now to shew Cause, why the Rule should not be absolute. The Case being fully laid before the Court appeared to be thus; That a Mandamus was directed to the Trinity-house at Hull to restore the Plaintiff to be one of the Brothers of that Society; they were willing to make up the Matter, so agreed to restore him, and that the Defendant, who was one of the Brothers should enter into a Bond to pay the Costs of the Plaintiff's Attorney's Bill; the Defendant did not pay it, upon which the Plaintiff was forced to do it; and now he brought an Action upon this Bond; and made Affidavit, that he was informed and believed the Bill was reasonable. The Question now was, whether the Court should order this Bill to be referred to the Master, and upon Payment of what was due stay the Proceedings. Mr. Fazakerly said, that in the Case of Martin and Thomplon he was informed the Court of Common Pleas granted a Motion of this Sort, whether the Defendant himself entered into such an Agreement; and the Reason for that Case was, that the Defendant had put himself into the Place of the Plaintiff, and as the Plaintiff should have this Privilege the

the Defendant shall have it too. Now, he said, he could not see, how the present Case differed from that. And though he admitted very willingly, that he could not bring Money into Court and strike it out of the Declaration; yet he said, he thought the Court had gone so far as to allow Proceedings being stayed, and taxing Bills upon such Applications. But the Court said, they could not allow of the Bill to be examined in this Manner. And Judge Page observed, that in no Way they could stay the Proceedings. For, he said, in Actions of Debt upon Bond for a Sum certain, the Court had gone so far; but never where the Condition was for Performance of collateral Covenants; and the present Case was in Reason something of that Sort. But however the Court advised the Plaintiff to go before the Master to save a Suit in Equity, which accordingly was agreed to.

P p

Term.

Term. Paschæ

2 Geo. II. 1729.

Goodright *and* Hart.Vide ante
128.

Serjeant Darnel moved to set aside a Judgment and Writ of Possession, upon Account that a Rule for a Trial at Bar had been obtained last Term in this very Ejectment. But the Court said, you have not got the Tenants to enter into a Rule to make themselves Parties, and the Rule for the Trial at Bar was only provisional in Case you did that, and therefore that Rule is now wholly set at large, and consequently what the Plaintiff has done is very regular.

Vide post
130.Boldifer *and* Newens.

What shall
be said to be
a good Assign-
ment of
a Bail bond.

ON Motion to stay Proceedings against the Sheriffs of London, the Counsel said, that the Plaintiff has taken an Assignment of the Bail bond, and therefore the Proceedings are irregular. But it was observed of the other Side, that this Assignment was void in itself, because the Statute requires that it should be attested by the Sheriffs, and Brocas and Levet were both Sheriffs for this Year, and yet it was attested per Ricardum Brocas & Ricardum Brocas, which was wrong. Besides too the Plaintiff's Counsel said, the same Statute requires, that the Assignment should have two Witnesses to it; now in this Case, after the Witnesses had put their Names to it, the Mistake in the Attestation was rased out and the Name Levet put in, so that now they said, the right Assignment was never witnessed at all; and therefore it was wrong too upon that Account. Accordingly the Court allowed the Plaintiff to go on in his Proceedings.

The

The King and Savage.

MR. Reeves moved for an Attachment against the Attorney for the Prosecutor for taking out an Attachment against the Defendant for not paying 5 l. in Pursuance of a Rule of Nisi prius, which he had entered into, and was made a Rule of this Court, whereas the Prosecutor himself ordered the Defendant not to pay the Money to the Attorney. It appeared too that the Defendant had paid the Prosecutor the Money before he was taken up upon the Attachment, and yet he was forced to give Bail to it below. The Court said, they did not know an Attorney had any Power to receive Money agreed to be paid in such a Manner, without an express Authority from his Client; accordingly they made a Rule upon him to attend, tho' refused to grant an Attachment.

How far an Attorney has no Authority to receive a Sum of Money belonging to his Client, without an Order for that Purpose.

The King and Rouse.

MR. Reeves moved, that an Order might be made upon Mr. Pender to let the Defendant have a Sight of the Venire and the other Process. But Mr. Strange said, the Defendant was convicted of Forgery, and therefore could move nothing without being present in Court. But the Court observed, that this was only a Complaint against an Officer for refusing to let the Defendant have a Sight of what he had a Right to; and therefore the Motion was proper in the Manner it was made, and accordingly granted it.

How far a Person that is convicted of a Crime need not be present in Court at the Time he makes a Motion in that Prosecution. Vide post 148.

Walton and Lease.

IN an Action of Debt upon a Judgment for 33 s. had upon a Non pros. Serjeant Girdler moved to bring the Money in to Court without Costs, and that all Proceedings might be staid; because he said, by the Statute of Gloucester this Court has no Jurisdiction in Actions for so small a Sum. He cited too two Cases where he said, the Court had made the like Rule upon his Motion; the first was Martin and Coke, Mich. 1718. which was an Action of Debt upon a Non pros. as this very Case is; the other, Sheppard and Tuff in Debt for Rent, and that was Hill. 1724. But the Court said, the bringing in the principal Sum is an Allowance of their Jurisdiction, and the refusing to bring in the Costs is a Disallowance of it; because in all Cases whatever where a Plaintiff has a Right to recover, he has a Right to recover with Costs; and therefore the Motion is contradictory in itself. But upon bringing in the Costs too they said, they would stay the Proceedings. However the Counsel not agreeing to do that, nothing was done. 3 Mod. 275. Salk. 674.

What is the proper Manner of taking Advantage of the Statute of Gloucester, confining the Courts of Westminster-Hall not to have Actions brought in them under 5 l.

The King *and* Rowse.Vide ante
147.

WHEN a Man is convicted of Forgery or Perjury, the Court said they never allow of any Motion to be made in Behalf of him, but upon his being brought into Court, tho' upon a Conviction for a Trespass or Riot they do. 1 Ven. 210.

Naylor *and* Scot.

Ante 92.

Vide post.
S. C.

THE Plaintiff having declared in Prohibition, and Verdict found for the Custom, M^r. Bootle moved in Arrest of Judgment, that the Custom was void; and accordingly the Court ordered Judgment to be stayed till the Postea brought in.

Aponymus.

How far in
Debt for
Rent Money
may be
brought into
Court.

IN Debt for Rent M^r. Hussey moved to bring Money into Court, and that it might be struck out of the Declaration. And he cited the Case of Lyfsey and Jones, Pas. 9 Ann. where in Covenant for Rent the Defendant brought in 6 l. and this Motion was allow'd. But the Court observ'd, that in such Cases as these they never allow any Thing to be brought in less than the Sum which is declared for. And in that Case of Covenant they supposed the 6 l. was the Whole that was declared for. And besides one of the Officers said, that the Manner of drawing these Rules is always in the general Form, upon bringing in what is due, so that it could not appear by the Rule, but the Whole was brought in in that Case. Salk. 596.

The King *and* The Inhabitants of Abbots-Langley.

MR. Reeves came to shew Cause, why an Order of Sessions confirming an Order of two Justices should not be quash'd. The Case was specially stated, that a Man having gained a Settlement at Abbots-Langley removed to Ordnam about forty-three Years ago, and there took a House with the Knowledge of the Overseers, as, he inform'd the Justices, he believed; afterwards kept an Ale-house for thirty-five or thirty-six Years there, which he had a Licence for; had five Children christened by the Parson of the Parish; was seated in a Pew by the Church-wardens; in R. James II.'s Time performed Watch and Ward; and work'd in the Highways or paid to the Surveyors. Upon his making Oath of these Facts before the Justices, they notwithstanding made an Order to remove him to Abbots-Langley. But the Chief Justice being of this Parish, he said he would give no Opinion, though he plainly intimated his Thoughts to be, that the Order was right. Judge Reynolds said, that the whole Exception against the Order is founded upon a Construction of the Statute of James II. cap. 17. and he said it was true, that Cases upon this Statute had gone so far as to allow of certain Acts to be equivalent to a Notice in Writing. And it is plain

plain the Parliament had followed this Construction by allowing several Cases still to remain without requiring actual Notice upon the Statute of 3 & 4 Will. & Mar. cap. 12. The Case in Carthew 28. is so, and so are those in Salk. 472, 476. but he thought the proper Reason to be given for these Cases is not to explain the Words (Notice in Writing) in the Statute of Jac. to what is equivalent to it; but to consider them as Cases omitted out of that Statute, and left as they were before to the Statute of 13 & 14 Car. 2. cap. 12. But then he said, he thought it might be a Question, whether since that Statute of Will. all such Liberty of Construction is not taken away even in Cases happening before that Stat. and whether those shall not fall under the same Regulation as Cases happening afterwards by the Parliament's declaring by that Statute what Meaning the Statute of Jac. always ought to have received. However taking this Case to be the same as if it had been to be determined immediately after the Statute of Jac. he said he doubted, whether any of the Circumstances in the present Case were stated strong enough to make it excepted; because the Times are not mentioned, when several of the Facts happened; so that it does not appear that they intervened between these Statutes. And as to that particular Fact of performing Watch and Ward, he said, that would not do; because the Officers that look to the Care of them are the Constables, by Way of preserving the Peace; so that that Act does not at all shew, that the Overseers had any sufficient Notice of his being amongst them. Then as to what is said of his Informing the Court of Sessions of his Taking a House with the Knowledge of the Overseers, nothing appears that the Justices credited him, and it is only set forth, that the Person himself believed it. This indeed, he said, might be Evidence to the Court below, but nothing on which this Court can found a Judgment. Accordingly his Opinion was, that the Order ought to be confirmed, and so Judge Page agreed with him. But J. Probyn said, that he thought this Case was plainly to be regarded as if it had been to be determined before the Statute of William, and then observed, that these Circumstances ought to be considered, as happening in the same Time as the Order is in which they are related. If so, it is plain he hired the House before the Statute of William; because afterwards it is said he performed Watch and Ward in R. James II.'s Time. Then as to the Belief of the Person, he said, he did not see but this Court ought to make the same Judgment upon that Evidence as the Court of Sessions ought. Accordingly upon the Judges not agreeing in Opinion, this Matter was put off to be argued again. Salk. 476, 473, 489.

Lisne and Lawrence.

MR. Fazakerly moved to set aside a Writ, because it appeared upon the Postea, that a wrong Jury tried the Cause, a different set of Jurors being upon the Panel from what was annexed to the Distringas. But Mr. Husley objected, that the four Days for moving in Arrest of Judgment were over, and this is a Motion of that Nature. But at least he said, he hoped, the Court

How far the Court will Arrest a Judgment, notwithstanding the four Days are expired.

Court would not stay any Thing if they should make a Rule to shew Cause. But the Court observed, that the four Days are only to stay the Judgment absolutely; but at any Time after that an Exception may be taken, as Amicus Curie to shew the Judgment ought not to be entered, if it is not entered already. They said, this was not like the Case of moving for a new Trial. And so they stayed all Proceedings, and made a Rule to shew Cause.

Shergold and Bolstrick.

Vide ante
142.

MR. Reeves came now and shewed further Cause, why a Pro-
cedendo ought not to go. He said, it was true indeed the Return was amended; but yet as it is now made, the Custom is void in itself. The Custom is set forth to be, that if any Person be indebted to another Person within the City upon simple Contract, Debt will lie against his Executors in the City Court. Now he observed that a Debt in one Part of England is a Debt in every other; so according to this Doctrine let a Debt be contracted where it will, if an Executor should come up to Town, he would be answerable for a Debt here, which perhaps he would not be responsible for in any other Part of the Kingdom. He cited too a Case out of Hob. 175. where such an unreasonable Custom as this was held void. Accordingly the Court delivered their Opinion, that the Custom as it is here returned cannot be maintained. Upon which Mr. Moreton desired to amend the Return again, and set forth, that the Debt was contracted in London. Judge Page at first doubted whether the Court would allow this without an Affidavit; but at last the Court agreed that it should, upon a Case that was cited out of Carthew 74. but said, as they had amended once already, they must pay the Costs of this Motion.

Goodright and Hart and others.

Vide ante
128, 146.
S. C.

SErjeant Darnel came now and informed the Court that the Landlords did enter into a Rule to make themselves Defendants in proper Time, and by that Act they were to be considered as Tenants of the Land; therefore he hoped that the signing Judgment against the actual Executor was irregular. But the Court said, it is plain the actual Tenants were only to be considered as Tenants in the Action; for if after the Tenants and Landlords have made themselves Defendants the Tenants should upon the Trial confess the Action, Judgment will immediately go to recover the Possession, and not stay to abide the Event of the Landlords Plea.

Anony-

Anonymus.

Serjeant Shepherd moved for a Habeas Corpus to be directed to the Warden of the Fleet to carry the Bodies of six of his Prisoners to give their Evidence against Huggins before the Grand Inquest at London. But as there was no Affidavit produced of their being material Witnesses, the Court said, they could not do it; for it is a Rule, that they never granted Habeas Corpus's out Affidavit. How far a Habeas Corpus ad Testificandum cannot be granted without Affidavit.

Sampson and his Wife and Coke.

IN Debt on Bond made to the Wife dum sola, the Defendant pleaded, quod non fuit Uxor, & hoc paratus est verificare; and only made Affidavit annex'd to it, that he believed the Plea was true. Upon which Serjeant Darnel moved to set it aside; because the Affidavit was uncertain; and because the Conclusion of the Plea ought to have been to the Bishop's Certificate. But the Court said, that a Negative cannot be sworn to in any other Manner; and they did not doubt, but upon strong Circumstances a Jury would find a Man guilty of Perjury upon such an Affidavit. Then as to the Conclusion of the Plea, they observ'd, that Uxor aut non Uxor was proper for a Trial by the Country, as well as copulatus in Matrimonio. But if there was any Doubt upon that, the proper Way was to demur. How far a Plea in Abatement shall be said to be sufficiently verified by Affidavit.

Philips and Knightley.

THE Counsel said little more upon the second Argument of this Case than they did upon the first. But the Court were clearly for the Defendant. They said there was no Occasion to give an Opinion as to the first Exception, whether the Award was good or not; because the second was plainly fatal. They observed, that the Defendant could give no Answer to the Assignment of the Breach; and therefore the Plaintiff must set it forth fully without any Thing of Uncertainty. Now it is only set out, that the Plaintiff was at the Place appointed and continued there between the Hours of 12; but what Part of the Time he staid there is intirely uncertain. However they thought if the Plaintiff had been there the last Instant that might have been good, whether he staid the whole Time there or not. But upon the Plaintiff's desiring Leave to discontinue, the Court allowed it him. Lev. 189. Vide ante 84.

Alardes *ver* Cambel and Sir John Williams. *Scacc.*

Vide ante 75.

How far Awards may be set aside by a Court of Equity, notwithstanding the Party does not file his Bill till after the Time which is prescribed by the Statute of 9 & 10 W. 3. 15. is expired.

THE Plaintiff not finding Relief against the Award in the Court of King's Bench brought his Bill in the Court of Exchequer against the then Plaintiffs and the Ampire, and prayed to be relieved against the Ampirage for two Reasons; one, that it was agreed to be delivered only conditionally, in case Alardes, when he returned from Scotland, should not lay before the Ampire sufficient Reason to require a Re-examination, but in Fact was delivered absolutely; and the Plaintiff now sets forth in his Bill several Reasons to induce a Re-examination, which he offered to Sir John Williams the Ampire. The other Reason was, that several Witnesses on the Part of Alardes were not allowed of by the Ampire. Cambel pleaded in Bar to this Bill, that Sir John Williams made an absolute and impartial Award according to the best of his Belief; but that the Ampirage was delivered above two Terms before the Bill filed, so that he was too late to take these Exceptions by a Provision in the Statute of 9 & 10 W. 3. 15. Sir John Williams put in an Answer to this Bill in a particular Manner, and set it forth with a great many Circumstances. Upon this Case the Court delivered their Opinions upon several Points. The Principal one was, whether Courts of Equity are not confined by the Statute of William to allow of Exceptions to Awards within the Time prescribed by the Act, as well as the Courts of Common Law? The Chief Baron said, his Opinion was, that they were not. He observed, that before this Statute, Agreements made in any Cause depending in Courts of Law, and afterwards made Rules of those Courts, had equally the Advantage of that speedy Remedy, which now all extrajudicial Agreements may have upon this Act of Parliament. But yet he said they were liable to be inspected by Courts of Equity, whether they were not attended with Circumstances of Fraud or Misbehaviour. And besides, as the Law then stood, if those Courts had enforced these Agreements by their Attachments; for proper Reasons these Courts might have granted their Injunctions. This Statute has indeed made an Alteration as to the Courts of Equity in this Respect, and says in general, that no Injunction shall lie upon such an Attachment; but a Bill to discover, whether there was Partiality in the Award or not, is left as it was before, and will not affect the Proceedings upon the Attachment. The Chief Baron cited several Cases too, where Bills of this Nature have been allowed. A Cause in this Court between M^r. Reynells and his Servants. Mullins's Case for Carpenters Wages. And one of M^r. Browam, where a Submission was made a Rule of Court in the Common Pleas, yet afterwards this Court examined into all the Circumstances of the Award which related to the Partiality of it. But he said the restrictive Words in the Act have one good Effect, that Exceptions for Partiality must be taken within the Time limited in those Causes where the Submission was made a Rule. The Chief Baron then said, that upon the Reason and Authority of these Cases he thought the main Objection was now got over; the next would not be of

so much Difficulty, that the Submission was made a Rule of Court after the Award made. For though indeed this has been doubted upon the Letter of the Act, yet the Reason of it extends to those Awards that are before the Submission is made a Rule of Court as well as Awards made after. And so this Point was settled in the King's Bench, and the constant Practice has been so afterwards. Thus far was spoken to the Substance of the Plea; but the Chief Baron objected then to the Form, that it ought to have answered particularly to the Circumstances of Partiality assigned by the Bill. He allowed indeed, if the Bill had charged the Empire with Partiality in general, the Plea as it is would have been a good Answer; but Circumstances of Partiality in an Award are like Circumstances of Fraud in other Cases; being set forth specially they require a special Answer. And he said, if Issue was joined in the general Manner, as this Matter is pleaded, the Plaintiffs would be at Liberty to give in Evidence what Circumstances of Partiality they should think proper. He observed this was not like the Case of a Bill of Review or a Writ of Error, where several Errors and Exceptions may be taken, and *In nullo est Erratum* pleaded to the whole; for there all the Mistakes appear upon a View of the Proceedings; but here it is left to a great Uncertainty according as the Interrogatories shall be drawn by the Parties. There might be an Objection farther made to this Plea, he said, from the Award's being only averred to have been impartial according to the Defendant Cambel's Belief; however that he thought might be got over, considering that the Fact could not lie properly within his Knowledge. Upon the whole of this Matter, he said, he was of Opinion, that the Plea should be over-ruled; but if the rest of the Barons thought it as well that the Plea should stand for an Answer with Liberty of excepting to it, he should not oppose it. Baron Hale and Cummins agreed with the Chief Baron in the two first Points; but Baron Carter differed in the Principal one. Baron Cummins and Hale agreed with one another in the third Point, but differed from the Chief Baron, and said, they thought the Plea well enough as it was in Point of Form. But however the whole Court agreed, that the Plea should stand for an Answer with Liberty of excepting to it.

Newton and Wibord.

THIS was an Action upon a Promissory Note, and the Memorandum was of Mich. Term, though the Date of the Note was in the Middle of it. Upon which the Defendant demurred. The Plaintiff joining in Demurrer, Serjeant Baynes now moved, that the Roll and Paper Book might be made right according to the Bill filed, and be made a special Memorandum; and produced an Affidavit, that the Bill was filed with a special Memorandum. The Serjeant owned, that the Bill was filed after the Demurrer put in, and therefore he agreed he must pay Costs, and the Defendant must have Liberty to plead *de novo*. And to support his Motion he cited the Case of *Walmesley and Corey*, Pasch. 2 Geo. 1. *M.* Strange said, the same Thing was

How far an Amendment may be allowed after joining in Demurrer.

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done

done in the Case of Calvert and the Count d'Esthelly, where this was done even after a Verdict. And he cited too the Case of Russel and Thorp. The Chief Justice said too in Debt upon Bond against an Heir he knew an Amendment after Verdict in the most material Part, by putting in the Word Heirs. Accordingly the Motion was allowed. 5 Mod. 16. Salk. 48.

Anonymus.

Vide ante
135.

THE Common Serjeant came now to shew Cause, why the Rule for the Mandamus's going should not be made absolute. He said, he must agree, that the Nature of the Office was pretty much the same as it had been represented by the other Side; but yet he observed that Turner was admitted into it only *quandiu se bene gesserit*. Notwithstanding which he behaved himself very carelessly in it, and upon that account was summoned before the Court of Aldermen to shew Cause, why he should not be discharged. He was heard upon this Summons, but said before the Court nothing satisfactory to clear himself, and upon that they discharged him. Under this Sentence he has rested a Twelve-Month; and therefore the Serjeant said he hoped this was a sufficient Answer to the Rule that was made. But the Court said, this may be proper to come upon the Return; so made it absolute.

Scot and Mayley.

Within what
Time Bail
shall be al-
lowed to
justify.

MR. Fazacherly moved to stay Proceedings on the Bail-Bond, which the Plaintiff had taken an Assignment of before the Time was out for justifying; for he said the Defendant had put in Bail regularly at a Judge's Chamber, the Plaintiff excepted, and by the Rules of the Court they had four Days after Notice of the Exceptions to justify; but notwithstanding this the Plaintiff took an Assignment of the Bail-Bond the fourth Day, which was irregular, and therefore their Justifying afterwards was well enough. He said, this was like a Defendant's being served with a four Days Rule to plead, he has all the fourth Day to plead in, exclusive of the Day of Service, and therefore the Plaintiff cannot sign Judgment till the fifth Day. This Case he said is different from an eight Days Notice of Trial; there he admitted the Plaintiff has a Right to carry on the Cause to Trial the eighth Day. The Reason for the Difference he observed was this; in the first Case there are distinct Acts to be done at different Times, one of which cannot be done till the other is omitted to be done; but in the other the Acts, though of different Persons, are to concur at the same Instant. He observed too there was another Mistake, that the Exceptions to the Bail were not entered in the Bail-Book. The first of these Objections the Court seemed to allow, so referred the Irregularity to the Master. The other they said, would be good in the Common Pleas; but here they said, where the Suit is by Original, it is not the Practice to do it. But afterwards they made a Rule, that the Exceptions should always be entered in the Filazer's Book.

Anonymus.

UPON Serjeant Chappel's Motion the Court granted a Mandamus to certain Justices of Peace to appoint Church-wardens and Overseers of the Poor in an extraparochial Place, upon an Affidavit, that there was much Occasion for these Officers to make Rates to relieve the Poor.

How far the Court will grant a Mandamus to appoint Officers in Extraparochial Places.

Edmunds and Thomas.

Serjeant Darnel moved to set aside a Verdict for a material Variance that there was between the Copy of the Issue delivered and the Record of Nisi prius; the Declaration being in Assumpsit, and the Date of the Plea appearing in the Record of Nisi prius, but not in the Copy of the Issue delivered. He said, the Defendant relied upon this Mistake, and therefore made no Defence at the Trial. The Court accordingly granted the Motion.

How far the Court will set aside a Verdict for a Variance between the Record of Nisi prius and the Copy of the Issue.

Goodtitle and Walton.

THIS Matter now coming on again, Mr. Strange shewed he could not maintain that an Ejectment would lie of a Tenement; but yet he said he should desire Time to see whether by releasing the Damages he could not recover notwithstanding. The Court said it was clear too that the Declaration was uncertain; though they did remember a Case out of Ireland of an Ejectment of 15000 Acres of Mountain, which might seem as uncertain, but was held good; though that indeed was helped by a Certificate from the Judges there, that 15000 Acres of Mountain had a certain Signification amongst them. But they observed that in the present Case if the Tenementum had been laid with a vocat' such a House, it would as certainly have been good. They said too, it might be proper to consider of the Method Mr. Strange proposed to help this, so put it off to another Day. 1 Ven. 49, 262, in Point. 1 Ven. 328.

Eskin and Cook.

IN an Action upon a Bail-Bond Mr. Strange moved in Arrest of Judgment, that as the Latitat which the Bond was taken upon stands upon the Face of the Declaration, it is void; for it is said, that the Plaintiff prosecuted the Latitat the 18th of July last, whereas the 18th of July was out of Term. But Mr. Reeves observed on the other Side, that it is not said, that the Writ was tested out of Term, and it is well known, that the Fact is so, that Writs are taken out of Term as well as in Term. He said too, that this very Exception was taken in the Case of Walburn and Salkinson, Sir Thomas Jones's Rep. 149. and disallowed. But the Court answered, that they are bound as Judges to take Notice, that no Process can issue out of their Courts, but in Term Time; and in those Cases where the Fact is otherwise, the Process is constantly tested of the Term

How far Process must appear not to issue out of Term Time.

Term precedent; they observed too, that all Pleadings must be according as the Operation of the Law is upon Facts, and not according as the Facts themselves are; and therefore they thought the Declaration to be wrong; but upon the Authority of the Case cited, they ordered this Matter to stand over. And afterwards they said, they doubted whether the Case cited was Law. Upon which the Plaintiff moved to discontinue.

Short and Scurry.

Vide ante
135.

THE Titling to the Affidavits was now made Right; and on Rule to shew Cause, why the Exceptions to the Writs should not be allowed upon them, Mr. Reeves said, that the Writs were tested right, in the second Year Geo. 2. and that answered one of the Exceptions to them. To the other he should say but little. But then he said, there has been another Exception taken since the first, that the Writs were not signed by Mr. Ventres's Mark; but he observed, that they had a Certificate from the proper Officer that now the Signing was put to them. But the Court said they ought to have been signed before the Executing them, and it is punishable to sign them afterwards. And they thought the second Exception was not answered, but the first they said nothing to; so set the Writs aside.

Sole and Waller.

How far the
Court will
not allow a
Person to
withdraw his
Plea.

What shall
not be said
to be an is-
suable Plea.

THE Plaintiff in this Case brought Covenant against the Defendant for not paying for certain Hops, which he had delivered to him, in pursuance to his Agreement. The Defendant did not plead in Time, and upon the Plaintiff's telling him therefore he would sign Judgment, the Defendant agreed to plead an issuable Plea; but notwithstanding he pleaded Non infregit conventionem generally, and upon that the Plaintiff demurred. The Defendant did not join in it; but now moved to amend. The Court said, this is not an issuable Plea; for that is such a one as will be good at all Events; now this is one, as will indeed be good after Verdict, but may be demurred for. To this Purpose the Case in Sid. 289. was cited. Accordingly as the Plaintiff had lost an Assize by this Breach of the Defendant's Agreement, the Court said, they would not allow the Defendant to withdraw his Plea, but obliged him to join in Demurrer.

Law and Wallis.

MR. Chute moved to set aside a Nonsuit in Ejectment for there being material Variances between the Issue delivered and the Record, and for that Reason the Defendant did not appear at the Trial; but the Court said, by your not appearing and confessing Lease, Entry and Duster, you are out of Court, and therefore cannot now make this Motion. But however they said, as the Plaintiff must proceed against you now upon the

Execution, they did not see, but they might help you in this Way, so made a Rule to shew Cause why Proceedings should not be said.

Law and Wallis.

MR. Parker came now to shew Cause, and said that the Parties to this Ejectment were both out of Court, and therefore he did not see, that the Defendant could have any Benefit by this Application. And besides he said, the Court would not be willing to give it him; because the Variances were totally immaterial. One he observed was, that the Issue is joined ut. the Plaintiff has declared, instead of prout in the Copy of the Issue, but in the Nisi prius Roll it is prout. Another that in the Copy of the Issue the Venire is hic ubicunque, but in the Nisi prius Roll it is ubicunque generally. To this Exception M^r. Taylor said, that where indeed the Proceedings are by Bill the Venire does order the Jury to come hic apud West; but where it is by Original it is ubicunque generally; but hic ubicunque is a Contradiction; so that that must be a material Variance. The Chief Justice was not in Court; but Judge Page said his Opinion was, that in these Cases the Court would not consider, whether the Variances were material or not; it was enough for them to see that there were Mistakes in the Copy of the Issue, as no Defence is upon it. But to the other Point the Court all agreed, that the Rule ought to be made absolute; for Ejectments are Creatures of their own; and therefore as the Plaintiff has not complied with the Intent of the Rule, which made him Party to the Suit, by Reason of the Variance he has made, the Court said they would not let him have the Benefit of it.

'The King and 'The Inhabitants of St. Matthew's in Ipswich.

MR. Strange came now to shew Cause, why the Order of Sessions should not be quashed. He said, there was Occa-^{Vide ante 108.} sion to say but little in the Defence of it; because the very Point has been before determined in the Case of Eastwoday and Westwoday, Trin. 7 Geo. 1. For it was held that a Son leaving his Father after his full Age intirely ceases to be any Part of his Father's Family; and consequently no new Settlement of his Father can any ways affect him. But however M^r. Fazacherly on the other Side said, that the Reason of a Son's gaining his Father's Settlement upon his Birth is not, that he is Part of his Father's Family; for if it should, then a Son could not gain a Settlement upon his Birth, if his Father had no Family. Now the contrary to that appears from the Case, where a Father dies before the Birth of his Son; yet still he will have his Father's Settlement. He said, if this was not the Reason of a Son's gaining a Settlement, it could not be the Reason of his changing it; and therefore if his Father's Settlement changes, and the Son has got
S f on

no new Settlement of his own before the Change, his not continuing Part of the Family can be no Objection why his Settlement should not change too, and consequently, as in the present Case the Son does not appear to have gained a new Settlement since his leaving his Father, he shall be removed as Part of his Father's Family. Mr. Lee said, that he thought the Case of *St. Giles's Redding and The Inhabitants of Everly Blackwater*, was a good deal to this Purpose; for there it seem'd to be laid down by the Court in general, that a Son's Settlement varies with that of his Father's. But the Court said, that they could not see what Foundation that Law could have of a Son's gaining his Father's Settlement, if not that of his being Part of the Family. And as to the Case of the Posthumous Child, they said, as to him the Family is considered as subsisting. And to give an Answer to Mr. Lee's Case, the Chief Justice said, he remembered the Children there were but of two Years old, so that they must be considered as Part of the Family. But Persons of the Age of 21 may at their Liberty set up whatever new Family they will. Upon which Mr. Lee desir'd then to take an Exception to the Form of this Order of Sessions, for its beginning ad general' Session' pacis tent' per adjournamen' without setting forth the Time when it was first holden. One of the Judges something doubted, whether Leave could not be given to them to amend; but as this Exception was taken after the first Term that the Order was brought up, the Court agreed it could not be done. So that they said if this Exception could not be got over, and none found to the Order of the Justices, the Parish of *St. Matthew's in Ipswich* must at all Events be charged with this new Family, because the Time for appealing is over. Accordingly they ordered this Matter to stand over.

1 Ven. 344. 6 Mod. 213.

The King and Wind.

What shall
be a good In-
dictment for
a Riot.

THIS was an Indictment for riotously taking two Water Engines; and now Serjeant Darnel moved in Arrest of Judgment, that the Words *Vi & Armis* were not in it. He said this Exception was allowed in the Case of *The King and Watson*, 2 Keb. 193. But Mr. Lacy said, that where-ever the Offence charged carries Force and Violence in the very Nature of it, the Words *Vi & armis* are not necessary; and here he observed, that the Offence was laid to be done riotously and tumultuously, and therefore it did so. He said too, that this very Exception was over-ruled in 2 Lev. 221. And therefore the Court ordered it to stand over.

Shergold and Bosrick.

THE Common Serjeant came now and informed the Court, Vide ante 142. that the Return was amended according to the last Exception; and therefore prayed a Procedendo. But Judge Page said, that he thought that yet it was not made right; for he observed, that it was true indeed, that the Return had set out the Custom to be, that where a Debt is contracted in London an Action of Debt will lie for it against the Executor in the City Courts; but then it says, that accordingly the Defendant was arrested upon a Process in an Action for Debt *cujus tenor sequitur in hæc verba*; and then sets forth, that the Plaintiff's Testator was indebted to the Defendant in the Parish of St. Helen in London, and so being indebted *concessisset solvere*. Now he took Notice, that it does not at all appear by this, that the Debt in the present Case was contracted in London; and therefore the Court below has not given itself a Jurisdiction. But the Common Serjeant said, that the constant Practice in the City Court has always been to declare in this short Way; and in this it differs from all other inferiour Jurisdictions; so that if the Cause of Action should happen not to have arisen within their Jurisdiction, the Party ought to plead it. The Court accordingly all agreed at last that the Return was sufficient; and upon that granted a Procedendo.

Bags and Thomson.

ON a Reference to the Master, he reported a Rule of Practice to be, that where an Attorney of the Court is Defendant he shall have no Imparlanee; but where he is Plaintiff the Defendant shall have an Imparlanee. But the Court said, How far Imparlanee are to be granted in Case of Attornies. that there was clear Reason for the first Part of the Rule; because Attornies of the Court are always supposed to be there present; but there was no Reason for the other Part of it; and therefore did not think there could be such a Rule.

Naylor and Scot.

THE Postea being brought in, the Court made a Rule to shew Cause why the Judgment should not be arrested. And now Serjeant Cheshire and Mr. Reeves came to shew Cause and said, that the Words of the Custom were, that every House-keeper having Child or Children born in the Parish of Wakefield in Yorkshire, at the Time of the Churching of the Mother of the Child, or at the usual Time after her Delivery, when she should be church'd, have Time out of Mind paid 10d. to the Vicar for and in respect of such Churching, or at the usual Time when the Mother of such Child should be church'd. They observed, that the two great Objections against this Custom were, that it is unreasonable in itself, and uncertainly set forth. To the first they observed, that Religion requires that a Woman should return Thanks to God in a publick Manner for so great a Deliverance, and therefore it is but fit, that he who assists her in such

such Office should have some Requitat. To the other they said, that there are other Cases, where these Courts allow of Ecclesiastical Courts to set forth Matters equally uncertain as in the present Case, even in Libels upon Customs; and yet have not granted their Prohibitions. To this Purpose they applied a Case, where a Libel was upon a Custom, that the Farmers of such a Town have always laid out 8 s. aut eo circiter, for Taxes and Ale in the Perambulation, and yet held good. Besides they said, if the Court was in doubt, whether the Proceedings in Courts below were usually in so uncertain a Manner, the proper Method would be to write to them, that they may certify how their Proceedings are there. To this Purpose they applied a Case out of Palmer 296. where a Libel was for a Woman's not coming to be church'd in a Cell; upon a Prohibition's being moved for, the Court writ to the Archbishop to certify how the Canons in that Case were; and he accordingly certified the Canon to require it. They observed farther, that though indeed the Time of Women's Fitness to be church'd is unknown to our Courts, yet in those it is well known; and therefore they might well have proceeded upon it below. The Canon Law says, that a Month is a reasonable Time for Women's coming to be church'd after their Deliverance, unless in Case of great Weakness. That Standard is the proper one to regulate this Custom by, and therefore the Court below ought to be allowed to go on in their Proceedings. But the Court said, they were of Opinion, that they were not to consider of the Methods by which this Fee might be ascertained, they were only to consider, it was not certain as it stands upon the Libel, and therefore upon the Libel they ought not to suffer them to proceed; for they observed according to the other Doctrine, that this Matter may be made right in the future Parts of the Proceedings, they may refuse to grant Prohibitions at any Time. But they said, that the Rule they founded themselves upon was settled in the Cases of Wood and Hicks, and Whitel and Offey, where a Modus was set out imperfectly, and they granted a Prohibition. But the Court observed, that the proper Method in this Case would have been for the Plaintiff to have set forth in the Libel the proper Time when Women usually are fit to be church'd; and then have averred, that the Defendant's Wife was not church'd within that Time. Upon the whole Matter the Court made the Rule absolute for arresting the Judgment. Salk. 332.

Hebeld and Thomas.

How far a Judgment shall be allowed to be entered up nunc pro tunc by Reason of the Record being lost.

MR. Strange moved to file a Roll of a Judgment in Trin. Term 1720. as of that Term; upon Account of its being mislaid; and produced an Affidavit, that the Judgment was signed and docketed in that Term. He said, the Judgment was given upon a Letter of Attorney, and he likewise produced an Affidavit, that the Administratrix of the Party giving it was willing to consent to this Roll's being entered up accordingly. He observed, that the Court had granted two Motions of this Nature before; one in Hill. 5 Geo. 1. King qui tam and Bolton, that

that was a Judgment in Prohibition; a Writ of Error brought into Parliament; the Attorney was carrying the Original and Transcript in his Pocket to be examined, and the Attorney happened to have his Pocket pick'd of the Original; and the Court allowed it to be entred up de novo. The other was the Case of Needham and Grayno, Trin. 9 Geo. 1. and the Court granted the like Motion. The Court said, they did not think the first of the Cases came up to the present one; for there no Lands could be affected by the Judgment; and if it was not for the Judgment's being docketed in the present Case they certainly should not do it; but however they were still to take Care of the Creditors, and therefore for fear this might be some Trick in the Administratrix in her Consenting to this, they made a Rule upon the Administratrix to give some Account of this Matter; and ordered the Docket-Book to be produced. Vide post
164.

Wyat and Winkworth.

THE Declaration in Ejectment was delivered before the Court on Day of this Term, and Notice was given to the Defendant to appear of this Term; upon which Mr. Gapper moved, that the Defendant might plead the next Term. The Court said, the Rule in my Lord Chief Justice Holt's Time used to be, that the Notice should be given to appear of the next Term, and they thought that ought to be the Practice now; but however as the Notice is often in Fact given the other Way, they allowed the Motion. The Notice which is requisite to be given at the Foot of the Declaration in Ejectment. Salk. 257.

The King and The Inhabitants of Roxenton.

THIS was an Order of Removal, which two Exceptions were taken to. One, that it removed several Children to a Settlement, which their Father had gained by living as a hired Servant with Lord Newport; and it does not appear but he might have been married at the Time he entred into his Service. The other, that some of the Children appeared to have been above seven Years old at the Time of the Removal, and it is not averred in the Order, that they had not gained a Settlement for themselves; whereas they might have done it from their Age of Seven. The first Exception the Court did not allow; because they would not intend, that he was married then; but for the other they at first thought it was good enough; because the Order says, whereupon the Justices adjudged this to be the last Place of their Settlement; and so that seems an Intimation, that the Justices had taken into their Consideration, that they had gained no other. But Serjeant Corbet saying, that this was only a general Conclusion from the Premises, the Court was of that Opinion; so made a Rule to shew Cause, why the Order should not be quashed as to them. The Certainty required in Orders of Removal in Respect of the Persons that are removed.

Vide post
s. C.

The King *and* Wind.

Vide ante
158.

Serjeant Darnel and Mr. Fazakerly came now and produced to the Court some more Cases, where their Exception has been allowed. The chief Objection to it they said was the Statute of 37 Hen. 8. cap. 8. but they observed, that the Preamble of the Statute only recited the Inconvenience, that was then as the Law stood, of Indisements laying the very Manner in which the Offence was done, viz. baculis & cultellis, gladiis & sagittis, and of Men's being obliged to prove their Indisements in the very Manner in which they were laid; for this Reason the Statute has provided, that it shall not be necessary for Indisements to lay the Fact to be done vi & armis, viz. baculis & cultellis, &c. which is no Proof at all of the Statute designing to alter Indisements in making it unnecessary to lay a Force in them at all; the only Intent of the Legislature seems to be, that it shall not be necessary to describe the Force, and that the Party shall not be tied up to the Description. They observed too, that it was plain the Statute has always been understood in this Manner from the constant Method of the Precedents that have been since; for they have always left out the Words baculis, &c. but retained the other of Vi & Armis. And this Point is settled with this very Distinction in 1 Ven. 265. They observ'd too, that in common Trespasses the Vi & Armis was the very Circumstance of the Fact which makes it indictable; for where a Trespass is done peaceably by a Man's walking over another's Ground, a civil Action is the only Remedy; but the Force causes a Disturbance of the Peace, and makes the Offence therefore indictable. The Counsel of the other Side said, that they relied upon the Words of the Statute, and the Case they before cited, to shew that the Words Vi & armis are in no Case now necessary in an Indisment. However in the present Case it is clearly good, as the Offence is laid to be done riotose & routose; for that carries with it Force, and was good at Common Law. To this Purpose a Case in Cro. Jac. 345. was applied. And that of Smith and Bowen, where Vi & armis in an Appeal of Murder was held unnecessary. And Mr. Masterman said, he remembered a Case determined about six Years ago, where insultum fecit was held good without Vi & armis. The Chief Justice said, he thought the Statute deserved well to be considered, whether that was not the proper Construction of it, which was contended for. But however upon the other Point the whole Court thought it clear, that the Indisment was good; so discharged the Rule for arresting the Judgment. 2 Ven. 158. 6 Mod. 96.

The King *and* Woolston.

How far the
Temporal
Courts ought
to punish Of-
fences against
Religion.

FIVE several Informations were preferred against the Defendant by the Attorney General, for publishing five Blaspheinous Libels, wherein the Miracles of our Saviour were turned into Ridicule, and his Life and Conversation exposed and vilified. His Counsel offered to move three Matters in Arrest of Judgment. One, that the Book was not writ

writ against the Christian Religion; the other, admitting it was, yet it could not be punished by the Temporal Courts; but was a Matter innocent in itself, and lawful for every Man to do. The third, that the Statute of 9 W. & M. 32. had appointed a less Punishment for this Offence, than was at the Common Law, and by that Means had taken away the Punishment at the Common Law. But the second of these Points the Court said, they would not suffer to be argued; for the Christian Religion is established in this Kingdom; and therefore they would not allow any Books to be writ, which should tend to alter that Establishment. They observed too, that as the Christian Religion was Part of the Law, whatever deserved that, deserved the Law, and consequently must be an Offence against the Law; for the Laws are the only Means to preserve the Peace and Order of every Government, and therefore whatever exposes them prevents the Peace and Order of the Government to be kept. They said the Case of The King and Taylor was exactly founded upon this Reason, as it is reported in 1 Ven. 293. and so was the Case of The Queen and Hall, where the buffooning the Trinity was held punishable by Information. This they said was a Point, that carried with it such clear Conviction in itself, that they refused to hear the Counsel give their Reasons why they should be heard to it. Upon which the Counsel began to speak to the first Point. They said, that the Intent of these Books were only to shew, that the Miracles of Jesus were not to be taken in a literal Sense; for as such they were not great enough to prove his Divinity; but that they were to be understood in a Mystical and Allegorical Meaning. But at most the Counsel observed, this Book could only be considered as striking against one received Proof of his Messiahship, and not attacking Christianity in general. To the third they said, that before this Act the Court could inflict a discretionary Punishment, which might have been much greater than that prescribed by the Statute; they said, that the Intent of this Act might well be construed to limit the Discretion of the Court, and by that Means take from the Court that Power of passing Judgments, which they had before; now they observed, that if the Power of passing the old Judgment was taken away, the Intent of the Parliament might well be construed to be to take away the old Method of Proceeding by establishing the new one. To the first of these Points the Court said, they were of Opinion, that the attacking Christianity in this Way was destroying the very Foundation of it; and though there were Professions in the Book, that the Design of it was to establish Christianity upon a true Bottom, by considering these Narratives in Scripture as Emblematical and Prophetical, the Court said, those Professions could not be credited; and the Rule is, *allegatio contra factum non est admittenda*. To the third Point, they observed, that this was against an established Rule, which says, that a new Law instituting a new Punishment shall not take away the old one, unless it changes the Offence, and makes it of a different Nature. 1 Ven. 13.

Good.

Goodtitle *and* Walton.

Vide ante
155.

MR. Strange said, he believed he could not get over that Exception in the Manner he proposed ; and therefore said, he consented that the Judgment should be arrested.

Evans *and* Thomas.

Vide ante
161.

THE Docket-Book being now produced, and there appearing a fair Entry of the Judgment, and upon the Counsel's saying he consented for the Administratrix, the Court made the Rule absolute for entering the Judgment up as of the precedent Term.

Term.

Term. Trin.

2 Geo. II. 1729.

The King *and* Robe and others.

A Patent had been granted to the Defendant Robe to be Clerk of the Market within the Clerge, and by Colour of it many Oppressions had been done to the People. Upon which the Justices of Middlesex at their Quarter Sessions made an Order upon him to produce his Patent, and upon hearing it read, they came to a Resolution, that the Patent only gave the Defendant Robe Jurisdiction within the Inner Clerge, and that his extending it into the Outer Clerge was illegal. Upon the Justices delibering themselves in this Way, and entering this into an Order of Court, Robe met with a good deal of Opposition in going on with what he had begun; and upon that preferred a Bill of Indictment at the Assizes against some Constables, and others that opposed him. The Justices at the Sessions then made another Order, that they would support the Constables in what they had done with the Publick Money of the County. Upon a Certiorari being granted to remove up these Orders Mr. Reeves mov'd to quash them; because the Justices had undertaken to determine the Validity of a Patent in a Method that did not properly bring the Matter before them. He observed, that the proper Way would have been to have indicted Robe for Extortion, to have moved for an Information, or to have tried the Validity of the Patent in a Scire facias. But as to the first of these Orders the Court agreed, that it was merely a Matter of private Opinion about the Patent, and no Adjudication of any Fact to be done in Pursuance of it; and therefore they thought it was not properly an Order made by them, and need not have been sent up in Return to the Certiorari. To the other of these Orders, they agreed, there was an Adjudication, and therefore, admitting it to have come properly before the Court, they allowed clearly, that they ought to affirm it or set it aside. Before a Certiorari issues there may be Reasons offered to the Court to prevent its going; but when it is gone, and an Order returned upon it in a proper Manner, it is necessary for this Court to do something in it.

When an Order is removed up by Certiorari, how far the Court is bound to give some Direction concerning it.

U u

But

But whether the Order did come properly before the Court in the present Case, they were not so well agreed; for Judge Probyn said, it was removed at the Complaint of one who was not aggrieved by it; the Occupiers of the Land in the County are the only Persons that can suffer by it, and the Clerk of the Market is the only one complaining of it. And he thought it was a Rule, that this Court will not concern themselves, where Relief is sought for by one who has no Occasion for it. Judge Page seemed to incline too to the same Opinion. But the Chief Justice and Judge Reynolds said, that they thought it the Duty of this Court to keep inferior Jurisdictions within their proper Bounds, let the Complaint be made by whom it will. They observed too, that the County were not blameable for joining in an Act to defend themselves against what was thought by them an Oppression; but whether the Method of Proceeding was justifiable in applying the County Money in this Way, they thought deserved to be considered of in a fuller Manner; and therefore made a Rule to shew Cause.

Vide post
S. C.

The King and Lewis.

How far the
Court will
grant a Man-
damus to Ju-
stices of
Peace to take
a Security.

Articles of the Peace were exhibited against the Defendant in this Court; and upon an Affidavit being produced, that he was very infirm, and that his Life would be much endanger'd by coming up to Town to give Security, M^r. Strange mov'd that a Mandamus might be directed to three Justices of the County of Brecknock, where the Defendant resided, to take his Surety. He said this Motion had been allowed before, Michaelmas 6 Geo. 1. in the Case of Sir Edward Seymour. Judge Reynolds said, the same was done in a Northumberland Case a few Terms ago; and accordingly the Court granted it.

The King and Bambridge.

How far the
Court will
not Bail a
Man in Case
of Murder.

UPON a Habeas Corpus directed to the Keeper of Newgate he returned, that he detained the Body of the Defendant upon three several Commitments; one, an Order of the House of Commons, which required him to detain the Defendant till he should be discharged by further Order of that House; another, a Warrant upon an Indictment of Murder, which the Defendant had been since acquitted of; the third, a Warrant from Sir Edward Bellamy upon a Charge of Felony upon Oath for stealing Goods to the Value of 27 l. M^r. Strange mov'd now, that the Court would be pleased to Bail him. To the first of these Causes of Detainer, he said, that the Parliament was prorogued; and therefore the Effect of the Commons Commitment was now determined. To the second he observed, that the Indictment of Murder was the Foundation for the Warrant; and therefore the Acquittal upon it must be the Reason for discharging it. To the third he took Notice, that an Act of Parliament had been made this last Session to disable the Defendant of holding the Place of Warden of the Fleet any longer than the fourteenth of June next, and to give his Majesty a Power of appointing one in his Room; and the

the Act requires the Defendant forthwith to deliver up an Account of the Prisoners, with the Causes of their Commitment, to the Judges of the Common Pleas. And if he shall neglect or refuse so to do upon Request, the Statute says, he shall be guilty of Felony without Benefit of Clergy. Mr. Strange observed, that the Prisoner's Confinement would disable him to give that just Account that he ought to do, by his not having recourse to his private Papers; this he said, he was obliged to do within so short a Space as seven Days; and he produced an Affidavit too from the Prisoner, that he had applied to his Servants, that keep the Prison, and he could not get the Papers from them; and yet an exact Account is immediately required of the Prisoner upon Forfeiture of Life. For these Reasons, he said, he hoped, the Court would grant the Indulgence he moved for. But the Court said, that they did not see, that the perplexed Circumstances the Prisoner had brought himself into would be any Foundation for this Court to go out of their ordinary Course. However they said, they did not think the Defendant's Circumstances were so perplexed as they are represented; for to be sure the Intent of this Statute is to receive a natural Construction; and therefore if the Prisoner does the utmost that is in his Power to discover the State of the Gaol, undoubtedly the Intent of the Parliament will be well complied with. Be this as it will, they said, the Precedents of this Court must be their Rule to direct them in the Exercise of this supreme Act of Authority. And they did not know, that ever this Court had done it, but where the Crown was slack in their Prosecution, or it appeared, that an Appeal had been brought before the Indictment, where the Defendant was acquitted, or some other great moving Cause of the like Nature. Upon which they refused the Bail in the present Case, and ordered the Prisoner to be carried back, without making any Rule for that Purpose. Then Mr. Strange desired, that an Entry might be made, that he had made his Prayer within the first Week of the Term to be brought upon his Trial, for fear they should not be able to bring him up the first Day of the Sessions to the Old Bailey. The Chief Justice said, he did not see it was likely to be of Service to the Prisoner; but ordered it to be done, and then he was remanded. Vide 1 Ven. 330, 346. Salk. 103.

The King and Hayes.

MR. Filmer moved, that the Defendant might be allowed the Benefit of a Day-Rule, and he said, Motions of this Nature have been allowed, where a Person has been committed for a Contempt. But the Court said, it was Part of the Punishment, that was pronounced upon the Defendant, that he should lie in Prison for a Year, and that Time is not yet out; so that they could not do it. And in the Case of Landen Jones, the Court said too, they never granted these Motions in Contempts; and this was, when he made the like Motion with this.

Vide ante 48.
How far the Court will not allow a Prisoner the Benefit of a Day-Rule.

The

The King and Croke.

What shall
be a good
Indictment
of Forgery.

THE Defendant was convicted upon an Indictment of Forgery of false Deeds, founded upon the Statute of 5 Eliz. c. 14. His Counsel moved in Arrest of Judgment, that the Indictment set forth, that Joseph Garbet was seised of Lands in Fee in Right of his Wife, called Jawick, lying in Clackston in the County of Essex, containing about 300 Acres; and that the Defendant, in the Name of Garbet and his Wife, forged a Bargain and Sale, by Way of Lease and Release of a Park, called Jawick Park, containing about 300 Acres, be the same more or less, situate in the Parish aforesaid, for the Consideration of 4500 l. and all this was laid to be done with an Intent to disturb the Freehold of Joseph Garbet and his Wife. Now the Defendant's Exception to this Indictment was, that the Statute of Eliz. makes it necessary, that the Conveyance charged to be forged should appear to affect the Freehold of some one; whereas in the present Case it does not; for that which is set forth to be disturbed, is Garbet's Freehold in certain Lands; whereas the Conveyance charged with disturbing it is a Conveyance of a Park; which is an Interest known to the Law under a particular Description; whereas Land is an Interest under a general Denomination. They observed too, that it was true indeed the Quantity and Parcels of one were the same with the Quantity and Parcels of the other; but that they said would signify nothing, the Things themselves being in their own Nature different. But the Counsel for the King said, that it was not material in this Case whether the Conveyance was set forth to be such as to be able to affect the Lands upon a Title in an Ejectment; it was enough that the Conveyance was set forth to be such as that a Court of Equity would have enforced it to bind the Land, if no Fraud had appeared in the procuring of it, and it had been considered as executed bona fide. Now that a Court of Equity would do this, they thought was manifest from other Instances. A Covenant is made to pass all the Lands a Man has in such a Town called White-acre; he makes a Conveyance of all his Lands called Black-acre; yet they submitted it to be clear, that if he has no Lands called Black-acre, the Court of Equity will enforce this Conveyance, and decree a quiet Possession in White-acre. So in the present Case, if there had been a precedent Agreement to pass the Lands called Jawick, they thought it would be beyond Question, that a Court of Equity would have enforced the present Conveyance; and they said the Execution of the present Deed, as it stands upon the Face of it, equally intitles itself to the Assistance of such a Court, as there appears to be a Consideration paid of above 4000 l. This Position then being now to be admitted, that a Court of Equity will render effectual this Instrument, the Counsel offered some Arguments to shew, that the Conveyance was within the Words and Meaning of the Statute. They observed, that if this Prosecution had been at Common Law, the Offence charged in the Indictment would have been punishable as a Forgery beyond all Contradiction; for Forgery in general is the Act of Counter-

Counterfeiting another's Hand or Seal with an Intent to prejudice him; and whether it has that Effect or not, is immaterial. The present Statute has indeed made that a Circumstance necessary in order that the Offence may come within it. But let this be done in what Way it will, it is all the same, so that this Effect immediately results from the Act. They said immediately; for tho' such an Effect may consequentially follow, they allowed that would not be enough. As if a Bond is forged, which afterwards may happen to be put in Suit in a Court of Equity; the Lands of the Party may in the Event be affected with it, as upon an Order of Sequestration; yet they admitted such Forgery could not be within the Meaning of this Clause of the Statute. But they observed, that this Statute was still to receive that natural Construction they contended for; as other Statutes of Forgery have been construed in the like Way; and indeed it is a Penal Law, it is an Act restraining an infamous Offence. The Statute of 1 Hen. 5. which is in Rastal's Edition, says, that whoever shall disturb another's Possession and Title in any Land shall be subject to an Action of Forgery of false Deeds; yet it has been held, that where a Conveyance of Land was forged, when he was out of Possession, it was within the Act, 3 Inst. 170. They said too, they allowed the Cases in Brook, pl. 11. and 19. Title Forgery of false Deeds, that in an Action of false Deeds upon this Statute of Hen. 5. it might be pleaded or given in Evidence, that the Plaintiff had no Interest in the Land at the Time of the Forgery; but they thought there was a great Deal of Difference between a Civil Suit, where the Party is to repair himself in Damages and a criminal Prosecution. But they observed, that for the Reasons mentioned before, here was too in the present Case a real Damage to the Party; upon which they prayed Judgment for the King. But the Court said, they did allow, that if the present Conveyance, as set forth in the Record, would give an equitable Right, it would clearly be within the Statute; for a Conveyance, which may be enforced by a Court of Equity is equally a Disturbance to a Man's Freehold, as a Conveyance, which may be enforced by a Court of Law. But they said, they were of Opinion, a Court of Equity could not enforce it; no more than if a Conveyance was of Black-acre for a valuable Consideration, a Court of Equity can make it be a Conveyance of White-acre. If indeed there had been a precedent Agreement set forth in the Deed to convey the Lands called Jawick; and the Execution of it had been as in the present Case; or any other Matter had been to have prevented the legal Operation of the Deed, when the Design of the Deed evidently discovered itself, the Court clearly allowed the Defect of it might have been supplied. But in the present one they thought the Interest charged to be conveyed, and the Conveyance itself, had no Kind of Relation to one another; so that at most a Court of Equity can consider it as a void Deed; and make the Party refund the Money. And as good Remedy as this may be had at Law; for taking this Deed to have been executed bona fide, an Action would clearly lie for so much Money received to the Party's Use. And the

the Method to proceed against the Defendant in a criminal Case would be to indict him at Common Law. Upon which the whole Court delivered their Opinions, that the Defendant must be acquitted upon this Indictment, but however put the Matter off to be considered of a little longer. 1 Vern. 40. 2 Vent. 365.

Vide post.
S. C.

Byrom and Baker.

How far in
Debt for
Rent the
Court will not
stay the Pro-
ceedings in a
second Ac-
tion, till the
Costs of a
Nonfuit in a
former Ac-
tion are paid.

IN Debt for Rent brought by an Executor, Mr. Reeves moved to stay Proceedings in this Action till the Plaintiff should pay the Costs in a former, which was for the same Cause. But it appearing, that this Action was for some new Rent accruing since that demanded in the former Action, as well as for the former Rent demanded in that Action, the Court said they could not do it; for it must appear by the Declarations, that both the Actions are exactly for the same Cause. They said farther, that it is not long since these Motions were allowed only in Executions. But what makes the present Case beyond all Dispute is, that the Court said, Executors never pay Costs upon Nonfuits.

Vide ante 42.

The King and Dr. Whaley.

How far a
Traverse
need not be
taken in
Quare Im-
pedir.

THIS Case had been removed up by Writ of Error into the House of Lords; but it was discovered there, that the Writ of Error in this Court abated by the late King's Demise; and therefore the Judgments and Proceedings were wholly here irregular; upon which a new Writ of Error was forced to be brought. Mr. Reeves said, as the Matter had been so solemnly argued here before, he hoped the Court would not go into it again; but pronounce the same Judgment now, they gave before. But Mr. Bootle desiring to mention a Case or Two, which he thought would give farther Light to that Point about the Traverse, which he argued before; the Court allowed him to do it. One of his Cases was out of 2 Cro. 650. The Defendant there set forth his Title in a Quare Impedir, that he was Parson imparsoner of the Presentment of J. T. and for Title to the said J. T. said, that long Time before the Plaintiff any Thing had, the Prior of Okey was seised of the Advowson in Fee, and presented thereto J. G. and afterwards surrendered his Possession to H. 8. that H. 8. died seised, and it descended to Ed. 6. from him to Queen Mary, from her to Queen Elizabeth, who died seised, and from her it descended to King James, who then was; that afterwards King James granted the next Avoidance to the said J. T. who presented the Defendant accordingly. The Plaintiff replies, that true it is, the Prior was seised in the Manner aforesaid, confesses the Surrender to H. 8. and the Descent to Ed. 6. but says, that that King by his Letters Patent granted the Advowson to Sir Tho. Wyat, who granted it to the Plaintiff, and then traverses the dying seised of Ed. 6. Upon which the Defendant demurs; because the Descents to the others were not traversed too. It was indeed allowed by

by the Court at that Time that the other Descents were not necessary to be traversed; but the Argument Mr. Boorle made from it was, that the Traverse of the Descent to Ed. 6. was allowed to be good. Now he observed, if that Traverse was material, the only Reason could be, that the Plea of the Defendant was not sufficiently confessed and avoided; and that could only be upon a Possibility, that Ed. 6. might have gained the Fee again, and therefore the Traverse of the Descent was required in that Case. Equal Reason, he said, there was to require it in the present one; for such a Possibility there is in the present Case; for though King William did present, and the Presentee was admitted, instituted and inducted, yet it might have happened, that the Presentee would not have subscribed the Articles; and by that Means the Presentation had been considered as void; and the King would still have had his Turn as before; for which Reason, he said, this was a stronger Case than the Case cited. 5 Rep. 102. He said too, there were other Cases where a Traverse seems unnecessary, and yet the Law requires it. To this Purpose is Yelv. 115. where in Debt brought as Administrator to D. the Defendant pleads, that D. made A. his Executor, he must likewise traverse, that D. died intestate. But the Court said, that they still continued their same Opinion they were of at first, that the Traverse would be intirely immaterial in the present Case; for the Defendant has shewn enough to destroy the King's Title, and the Intendment of the Presentee's not subscribing the Articles is very remote. But in the Case cited out of Croke the Court said they took the Reason for that to be, that the Defendant had alledged more than he need have done for his Title, and by that Means gave the Plaintiff Liberty to traverse the Surplusage or pass it over as he thought proper. Then as to the other Case, they said the Reason of it depended upon a positive Principle, that two Negatives inconsistent with one another will never make an Issue; accordingly they reversed the Judgment in Ireland again. 1 Salk. 297.

Stent and Warwick & Ux'.

UPON a Writ of Error out of the Common Pleas in an Ejectment, the Error assigned was, that the Count was upon two Demises by different Persons for different Lands for different Numbers of Years; and yet the Judgment was quod recuperaret terminum suum prædictum in tenementis prædict'. But the Court said, that should be understood reddendo singula singulis. But they did allow, if the Lands had been the same, it would have been otherwise for the Uncertainty of what is to be recovered; accordingly affirmed the Judgment.

What shall
be said to be
a good Judgment
in an
Ejectment.

Roche and Hepman.

How far a Person, that is beyond Sea, shall not be barred by the Statute of Limitations.

IN an Action upon the Case for several Promises, the Defendant pleaded the Statute of Limitations. The Plaintiff replied that he was beyond Sea at the Time of the Promise, and that he brought his Action within six Years after his Return. Upon a Writ of Error out of the Common Pleas it was now debated, whether the Replication was good, or not. Mr. Reeves objected, that Assumpsits were within the Purview of the Statute, but not within the Proviso; for the Proviso enumerates all the Actions in which it relieves, but the present one is omitted. And he observed that the Judges have construed this Statute according to the Words; and not according as the Meaning of it may be gathered by equitable Inferences. To this Purpose he applied a Case out of Show. 98. where the Defendant was beyond Sea at the Time of the Promise, so that the Plaintiff could not bring his Action against him; and yet it was held he was within the Intent of the Statute. This Case the Court said, they clearly allowed, for the Plaintiff might have taken out an Original against the Defendant notwithstanding he was beyond Sea. So that he was clearly not within the Relief of the Proviso of this Act, as he had evidently another Way to help himself. However upon the Authority of the Cases cited out of 2 Saund. 120. and 1 Cro. 245. they thought the present Case clearly within the Intent of the Proviso; for it would be a strange Thing, that the Statute should give Relief in Actions for Words, where there are only two Years given to bring the Action in, and yet should not give Relief in Assumpsits, where there are six Years given. Accordingly they affirmed the Judgment. Vide Stat. 4 Ann. cap. 16, 19.

The King and The Inhabitants of Rexam Regis.

How far the King's Bench will quash an Order relating to a Poor's Rate.

MR. Wynn moved, that an Order of Sessions, repealing a Poor's Rate made by two Justices, might be quashed. The Exception he took to it was, that the Reason the Justices at the Sessions went upon appeared to be imperfect; for it was, upon its appearing to us that the old Rate upon the House was but 20 s. we therefore quash the new Rate appointing it to be 40 s. But the Court said, that may be a good Reason or a bad one, according as the Circumstances of the Case appeared to the Justices; for if the House was improved double the Value it used to be of, it was certainly improper to set it aside, because the Rate was a very just one; but if the House continued pretty much of the same Value it used to be of, it was undoubtedly right to repeal it. But at last it appearing, that the Justices appointed this Rate of 20 s. to be the perpetual Rate upon the House; the Court said, they thought it clearly bad; for a Rate must be of its own Nature variable; and therefore made a Rule to shew Cause. Salk. 526.

Vide post S. C.

B. R.

Birch and Leek.

UPON a Writ of Error out of the Common Pleas in an Action of Trespas, the general Errors were assign'd, want of an Original and Warrant of Attozney. A Certiorari to the Custos Brevium to certify whether there was any Original of Hil. Term last, which was the Term of the Placita; he returned no Original of that Term. But upon another to certify whether there was one of Mich. Term preceding, he returned that there was, but with no Continuances. Upon which Mr. Filmer excepted, that as it was to be taken, that the Original was not continued down from one Term to another, it could not be considered as an Original in that Action. But besides he said, there was another Objection too to be made, admitting there were the Continuances, that there is a material Variance between the Writ and the Declaration; in that the Declaration is of a Trespas in 1 June 12 Geo. I. but the Writ is of a Trespas contra pacem nostram. But Mr. Reeves said, as the Terms were contiguous he did not see any Reason for Continuances, but if there was Occasion for any, the Court would Order a Certiorari to go of Course ad informandam Conscientiam Curie to see whether there were any or not. The same he observed was done in the Case of Wynkworth and Clark, Trin. 4 Geo. I. He allowed there was an Affidavit produced in that Case of there being actually Continuances; but he thought that could not be material. Then as to the Variance, he said, even before the Statute for the Amendment of the Law, it was held to be well enough after a Verdict, though not upon a Demurrer, in the Case of Day and Musket, 6 Mod. and he observed, that this Statute has given the same Relief upon a Judgment Nby il dicie as after a Verdict. The Court agreed as to the first Point, that an Affidavit could not be material in this Case, no more than where want of an Original is assigned for Error; and accordingly granted the Certiorari; and when this was returned they said it would be proper to consider of the other Point.

How far the Court will grant a Certiorari in order to certify Continuances.

Stent and Watkins.

THIS was a Motion upon the Act of Parliament passed the last Sessions, relating to Persons in Execution for a Sum under 100 l. The Case, which the Court delivered their Opinions upon, was, that the Defendant had been taken in Execution and escaped before the 29th of September last, and was out upon the Escape on that Day, but was since taken up upon an Escape Warrant; and whether he could have the Benefit either of the Act for the Insolvent Debtors, or of the Act before mentioned, was the Question. The Court was of Opinion, that he could have the Benefit of neither. Of the Debtors Act it is clear he could not; for that provides only for such as were in actual Custody on the 29th of September; and the other they said was as clear; for now by Relation he is in upon the first Execution; and this is not considered as a new one since the 29th, which the Statute only extends to, but a Continuance

How far a Person shall not be allowed the Benefit of the Insolvent Debtors Act.

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tinuance of the old one. However the present Case did not appear to come out to be this; for it was said in general only, that he had escaped from Execution, but it did not appear, when that Execution first was, which he lay under. But that Case the Court said was equally improper for them to give Relief upon; because it ought to appear, that he was in Execution since. So the Court refused to do any Thing in it.

Swan and Wife.

How far the Court allows of Amendment without paying Costs.

THE Plaintiff had made a Mistake in the Copy of the Issue by leaving out the Words per Johannem Allen Attornatum suum. And the Court said, an Amendment of this Sort may be made without paying Costs.

The King and The Inhabitants of Rexam Regis.

Vide ante 172.

TWO Justices made an additional Assessment of two Pence in the Pound; and upon Appeal to the Sessions they vacated that Order but ordered themselves, that the Money already levied upon it should be paid over to the succeeding Overseers; whereas Mr. Wynn said, they ought to have ordered, that the Money should be repaid the Persons, whom it was levied upon. Accordingly the Court quashed this Part of the Order, and confirmed it as to the other Part.

Mole and Parson.

How far the Court will discharge a Person out of Execution, by Reason of a Defect in the Warrant.

A Writ of Execution was taken out upon a Judgment in the Common Pleas returnable in that Court; but by Mistake the Warrant made out by the Sheriff mentioned the Writ to be out of this Court. Upon this the Court discharged the Defendant out of Custody upon this Execution; for they said, the Warrant was what he was taken up upon, and that was wrong. But they observed, the proper Way of helping this Mistake would have been to have served the Defendant when he was in Custody with a true Writ of Execution out of the Common Pleas.

The King *and* The Inhabitants of Holiborn.

MOTION was made to quash an Order of two Justices, and an Order of Sessions confirming it. The Case was specially stated, That a Man rented a Farm of 12 l. per Annum and that Part of the Lands to the Value of 9 l. per Annum lay in one Parish, and that the other Part lay in another Parish. Upon which the Justices were of Opinion, that he gained no Settlement by this Means. Exception was now taken to the Orders upon this Account; because the Farm is considered as one intire Interest, and therefore, where the greatest Part of it is, there the Settlement shall be. Accordingly the Court made a Rule to shew Cause.

When Part of the Lands which a Person occupies, lie in one Parish, and Part in another, which of the Parishes his Settlement belongs to. Vide post S.C.

Hornby *and* Cornford.

THIS Matter coming on again, Mr. King desired of the Court, that the Defendant might have Liberty to replead; and he said a Repleader has been allowed after Argument upon a Demurrer. 3 Lev. 440. The Court said, they believed Repleaders were allowable after Argument. But they observed that the present Case was not properly intitled to a Repleader at any Time; for a Repleader is never awarded but where it clearly appears, that the Judgment ought to be given for a Man, but for some Default in Form it cannot. But if a Repleader should be allowed in the present Case, it ought to be allowed in every other, where the Defendant is guilty of the greatest Mistake in Substance. However the Case stood over to be argued again; because no Body was ready to speak to the Point, that was started in the former Argument. But afterwards the Plaintiff accepted an Offer of the conditional Sum with Costs; so nothing more was done.

Vide ante 104.

The King *and* The Inhabitants of Roxeter.

Judge Reynolds at first declared his Unwillingness to confirm the Order as to the Father; because the Consequence would be, if it should happen, that these Children should not have gained any Settlement to themselves, they must be removed too from Shorebury to Roxeter, when the Truth of the Case possibly may be, that the Father himself ought not to be settled there. However at last the Court agreed, that Roxeter must be taken to be the Father's Settlement, and this is only a Consequence from it, that they must have the Children too, unless they have got a Settlement to themselves elsewhere. However as the Order was now made, they confirmed it only as to the Father and Mother, and quashed it as to the three Children.

Vide ante 161.

Fortescue Aland and Mason.

Vide ante
109.

ON Rule to shew Cause, why the Writ of Error should not be amended upon the Statute of 5 Geo. 1. 13. *M. Boode* said, that the Altering the Writ in the Exception taken would be to make it a Writ of Error in the Cause, whereas it was none before; and this he said would not be Amending the Writ, but Forming a new one, which the Statute does not extend to. He observed besides, that this Mistake of the Plaintiff had put them under a Necessity to make their Plea a vast deal longer than otherwise it would have needed to have been; for upon the Plaintiff's omitting to make Jonathan Mason Tenant in Tail, they were forced to set forth the several Limitations in order to make out the Defendant's Title; for as Jonathan was made only Tenant for Life, the Defendant had not a Colour of Title. But now if the Plaintiff's Writ of Error is made right in this Particular, all this Part of the Defendant's Plea that has been mentioned is made intirely impertinent; which he said would be trifling with the Defendant in such a Manner, that he hoped it should not be allowed. But if it should, at least he hoped the Court would give the Defendant his Costs. But the Court said, that they thought this Case was plainly within the Words and Meaning of the Act; for they are, that Writs of Error shall be amendable for any Variance or other Defect whatsoever. Now they observed, that the Writ of Error in the King's Bench in Ireland set forth, that Jonathan Mason was Tenant in Tail, and that Writ of Error is Part of the Record sent up; this Writ of Error differs from that, and therefore there is a Variance in it directly within the Words of the Act. Then they said, that the Defendant might have applied to have had this Mistake rectified; and therefore it was his own Fault in being at this Expence in lengthning out his Plea. They were of Opinion likewise, that the Defendant was not intitled to his Costs; for the Statute does not give any, and then they did not see, how they had Authority to do it. But indeed upon quashing Writs of Error they do give Costs, for the Statute for the Amendment of the Law has commanded them to do so.

Gurnel and Fawl.

ON Rule to shew Cause, why an Execution should not be set aside for its being made after an Allowance of a Writ of Error in Parliament, *M. Reeves* said, that the Writ of Execution was sealed before the Writ of Error taken out; and as Bail to it was not put in, it could not be a Superfedeas. But *M. Strange* said, the Writ of Error is a Superfedeas from the Time of the Sealing it. The Court indeed allowed, where Bail is afterwards put in, the Writ of Error is a Superfedeas by Relation from the very Sealing of it; but as Bail was not put in yet, the Time of the Service of the Execution was at present to be considered as regular. But where indeed no Bail

is to be put in, the Writ of Error is a Superfedeas from the very Sealing of it. The Court accordingly would have discharged the Rule; but it coming out, that the Writ of Execution was sealed before Judgment, the Court said, that was totally irregular; and it would be well for the Plaintiff that nothing more was done.

Goodright, on the Demise of Baker, *versus* Sturdy.

THE Plaintiff in this Case had got Judgment, and taken out a Writ of Possession; when the Sheriff came to execute it, the Tenant offered to attorn voluntarily; upon which the Sheriff did not execute his Process; the Time of the Return of the Writ run out; and then the Tenant refused to attorn. Upon which Mr. Lee moved for a new Writ of Possession; and relied upon the Case of Kingsdale and Man, Salk. 321. But the Court said, that they never granted a new Writ of Possession, but where it appeared upon Record, that the first Writ was prevented from being executed, by entering a Non misit breve; or some other Evidence given, that the Effect of the Writ was immediately frustrated as soon as it was executed. Accordingly refused to grant this Writ, till such an Entry should be made. 2 Ven. 115. Salk. 321.

How far the Court will not grant a new Writ of Execution.

The King and The Parish of St. Stephenson in the County of Bedford.

THIS was an Order of Removal from the Parish of St. Peter's in Bedford to the Parish of St. Stephenson made by the Justices for the Town of Bedford. Mr. Marsh took an Exception to the Order, for its being only laid in the Margin Villa de Bedford, without mentioning of what County. Now he observed that it was necessary to mention what County this Bedford lay in; because the Appeal must be to the Justices of that County where it does lie. The Court accordingly made a Rule to shew Cause.

What shall not be said to be a good Order of Removal, by Reason of its Uncertainty in describing the Place from which the Removal is made. Vide post S. C.

The King and Roebottom.

MOTION was made, that the Defendant, who was brought up by Habeas Corpus, might be bailed. She was committed for forcibly detaining certain Goods, for being concerned in the stealing of them, and lending Money upon them, knowing them to be stolen. It was now objected to the Commitment, that the Justice of Peace had no Power to commit for forcibly detaining Goods, though he has for forcibly taking them; and besides, that the Commitment was imperfect in charging her with lending Money upon stolen Goods, knowing them to be stolen; though it was not illegal; for this is good Evidence of her receiving stolen Goods, knowing them to be stolen; and therefore she ought to have been committed generally for that. The Court said nothing to the first Objection; but to the second they said, that the Commitment must then be amended. They observed too, that there was no Place mentioned in the

When a Person is brought up by Habeas Corpus, how far the Court will discharge him, by Reason of defects in the Commitment.

the Commitment, where the Goods were stolen; so that they could not know where to bind her over; and therefore the Commitment was bad too upon that Account. Accordingly they told the Justice, that he must charge the Prisoner with a new Commitment, and they would remand her. But then the Fact coming out, that the Defendant was only brought before the Justice as a Witness, to charge another with the Stealing of the Goods, and when she was upon Oath, that the Justice examined her how she came to lend Money upon them, when she knew they were stolen; and, upon her confessing that she did, committed her; the Court said, that that was intirely illegal; for no Person ought to be examined upon Oath in any Manner whatever to charge himself criminally; and therefore though the first Questions were very proper as to her Knowledge of the Theft; yet they said, this ought not to have been a Handle to the Examining her as to the others, by which she herself was made criminal. Accordingly the Court discharged her.

Mathews and Spicer.

Vide ante
57.

S Erjeants-Inn Hall in Chancery Lane. This was a Writ of Error upon a Judgment in the King's Bench. Lord Chief Justice Eyre said, that he took it to be a Rule, that wherever there is a special Assignment of Errors, or a general one upon the Plea of *In nullo est erratum*, the Assignment must always be entred upon Record, before this Court will allow the Counsel to speak to them. But he said, according to his Paper-Book, there was no Assignment entred upon Record at all; and therefore he thought it would be irregular to proceed. The Chief Baron said, that he believed the Practice had been to enter no Pleadings here upon the Writ of Error at all; and therefore however agreeable perhaps it would be to the Dignity of the Court to make a Rule, that the Pleadings upon the Writ of Error should be entred upon Record for the Future, before this Court would hear Counsel speak to them; yet he thought it would be hard, that the Parties now before them should not be allowed to go on. Besides he observed, that the present Court was not properly to be considered as the Court of Erchequer-Chamber; for they could not pronounce a final Judgment here; but that must be done at the Erchequer-Chamber at Westminster: And therefore, as this was only a preparatory Meeting, he thought the Court might dispence with that strict Method of Proceeding here, and order the Assignment to be entred upon Record before they pronounce their Judgment at Westminster. In the present Case besides, he said, there might be a particular Inconvenience; for if it should be considered, that the Plaintiff has not yet assigned his Errors, the Defendant would have it in his Power to Non-pros the Plaintiff for not having assigned them; for the Time for Assigning them is out. But the rest of the Judges and Barons agreed with the Chief Justice; for they said in general, that all Proceedings upon Writs of Error are regularly entred upon Record before they are argued; and in this consists the Difference between these Proceedings and the original ones. As this Rule is so plain and general, they were
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of Opinion, that they ought to act according to it; and therefore however perhaps the more frequent Practice may have been, or the present Plaintiff may suffer an Inconvenience, the Court said, they thought that ought not to be regarded. Accordingly this Assignment being omitted upon Record, the Court refused to go on; and all the other Causes being the same, where some of the Assignments should have been generally entered, the others specially, the Court ordered them to be entered by such a Day, and so adjourned. 2 Cro. 119.

Roberts and others *versus* Mundford.

THE Plaintiff marked his Latitat for so much Money for Goods sold and delivered to the Defendant's Testator, and declared for Part of the Sum for Goods sold and delivered to the Testator himself, Part for Goods sold and delivered to another upon the Testator's Account. Upon which Serjeant Eyres moved for an Imparllance. The Court seemed to think, that if the Declaration had been for Part of the Money for Goods sold and delivered to the Executor, and Part for Goods sold and delivered to the Testator, the Defendant would have been intitled to an Imparllance. But, as in the present Case both Debts accrued upon the Credit of the Testator, and therefore were both to be considered as his own Debts, the Court thought it was otherwise. And what Judge Page said confirmed it; for he observed, that a Contract of this Nature need not be reduced into Writing since the Statute of Frauds and Perjuries; so that it is plain it is not considered as a Promise to pay a Stranger's Debt, but merely a Debt of the Party's own. However the Court made a Rule to shew Cause, as it was a Case of new Practice upon the special Latitats.

How far an Executor shall be intitled to an Imparllance.

Vide post. S. C.

Dicks and Redding.

MR. Draper moved to set aside a Judgment, tho' regularly sign'd, upon Payment of Costs, Pleading the general Issue, and going to Trial as soon as the Plaintiff could have done, if he had not signed his Judgment. The Court said, they did not use to grant these Motions; but that they had lately altered their Rule; and therefore allowed the Motion to be regular enough. But as the Circumstances of the present Case were, they did not know but the Defendant might by this Means net the Term, and so there might be a Prejudice; however they said, they would grant the Motion in the present Case notwithstanding, if the Defendant would give Judgment in Debt in another Action, with a Release of Errors, and agree not to go in to Equity. The Counsel desired Time to speak to his Client upon this Proposal; and the Court gave it him, as the Writ of Inquiry could not be executed till Saturday next. However the next Day, when the Counsel consented to the Proposal, the Court said, that they thought the Defendant had already abused and got more Time than he ought to have done; and therefore refused the Motion. And Judge Reynolds said, if they should

How far the Court will set aside a Judgment, notwithstanding it be regularly signed.

Should go farther, than to allow these Motions, where the Party would have his Trial, as soon as he would have had regularly at first, their Orders would rather be Decrees in Equity, than Judgments in Courts of Law. Salk. 402, 518.

Bellow and Pew.

How far the Court will stay Proceedings in an Action on bringing in to Court what is bona fide due.

Vide post S. C.

THE Plaintiff had declared for 3 s. 2 d. for Rent, and 97 s. upon a Mutuatus. Upon which Mr. Hervey said, that there was no Colour, that any Thing more was due than the 3 s. 2 d. and the 97 s. was only added to make a Cause of it in this Court; he said, if this Practice was allowed, it would lead to a great Deal of Oppression; and therefore he moved, that upon bringing in the Money due upon the first Count with Costs, Proceedings might be stayed. The Court said, that they had never gone so far as to allow Money to be brought upon one Count; but however as this was such a Piece of Evasion, the Court made a Rule to shew Cause.

Guinel and Thomson.

When a Judgment is pleaded, how far it is requisite that a Note should be given of the Number Roll of the Judgment.

MR. Jeffrys moved now, that the Rule might be absolute. It was to shew Cause, why the Defendant's Plea should not be rejected, unless he would give the Plaintiff a Note of the Number Roll, which the Judgment was entered on, that he pleaded. The Master said too, it was a standing Rule of the Court, that a Plea of this Sort should never be received, without such a Note being given. The Court thought it was a very proper one, so made the Rule absolute.

Elford and Cating.

When a Person enters in to a Rule to give material Evidence in a certain Place, what shall be said to be a Breach of it.

Sittings at Guildhall. In an Action upon a stated Account the Plaintiff was bound by Rule of Court to give material Evidence in London. The Evidence given was, that one of the most material Items was grown due there. But the Chief Just. said, that that was not enough, for the particular Items are now immaterial by the Account's being stated. However the Defendant's Counsel said, they could not have Benefit of this here; they must apply for a Breach of the Rule in another Place; so the Plaintiff had a Verdict.

Cripple and Evans.

When a Tender is pleaded, what Kind of Evidence shall be allowed in Cases of this Sort.

Sittings at Guildhall. This was an Action, where there were several Counts; the first upon a Note for 42 l. payable a Month after Demand; the second upon a Quantum meruit for Nursing the Defendant's Children; the third upon another Note, bearing the same Date, for the same Sum, and payable in the same Manner as the first; a fourth for Money laid out for the Defendant's Use. To the first of these Counts the Defendant pleaded a Tender; to the third Non Assumpsit; and to the

the other Two, Nil debet. Mr. Kettelby for the Plaintiff said, that it was not incumbent upon them to prove the first Issue; but to prove the third, they would give in Evidence the Note itself; to the Second, they would prove, that Part of the Service was done before the Note given, and Part after; and to the Fourth, they would prove 4 s. due. The Counsel of the other Side said, that if they should be able to prove a Tender upon the Note as laid in the first Count, it would not be enough for the Plaintiff to give in Evidence one Note to prove his third Count; but he must give in Evidence two distinct Notes, as they are under the same Description; for otherwise they said, the Note given in Evidence upon the third Count shall be intended the Note which the Tender is pleaded to. They said besides, that when it does not appear what Consideration a Note is given upon, it shall be intended to be given upon the Considerations then subsisting; and therefore as it does not appear upon what Consideration the present Note was given, it shall be intended to be given in Discharge of the Money that was then owing for Nursing. In Answer to the first of these Matters, Mr. Kettleby said, that the Plaintiff had admitted the Notes to be distinct by Pleading different Pleas to them; and to the other he said, that there was no Occasion to give in Evidence any Consideration of them; and therefore the Court were not to intend, that they were made upon this. However the Chief Justice observed, that these Notes must be intended to be the same; and it is a frequent Practice to lay the same Matter over in different Counts; and if the same Plea of a Tender had been made to both, the same Objection might have been made, that this Tender only respected one Note, whereas you say, there were several. To the other Point, he said, that where no Consideration appears upon a Note it must be intended to be given in Discharge of what appears to be then due. Thereupon the Jury gave their Verdict according to his Directions.

Boston and Forest.

IN Debt upon an Assignment of a Bail-Bond a general Demurrer was to the Declaration. The Exception that Mr. Strange took to it, was, that the Bail-Bond was for 410 l. whereas the *Ac etiam* was only for 400 l. Now he observed, that the Stat. of 13 Geo. 1. requires, that Bail shall be given to the Sheriff for no more than the Debt sworn to, and that appears by the *Ac etiam*; and as this is a general Law, he thought the Exception might be well taken in this Case. But Serjeant Chapel said on the other Side, that he had known Complaints to the Court of Common Pleas of Officers taking more Bail than the Sum sworn to, and they would not make any Rules upon them, where the Bail-Bond was pretty reasonable. The Court said, that they thought here were two Questions of considerable Difficulty; one whether the Statute intended to restrain the Sum contained in the Penalty of the Bond to the Sum sworn to;

What shall
be said to be
a good Bail-
Bond.

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to; or whether the Legislature considered Bail according to the legal Signification of the Word, and so to restrain the Sheriff only from taking double the Sum sworn to, as a Security for the Debt. The other Question was, admitting the Act of the Sheriff to have been illegal, whether the Bond should be considered as void, or the Sheriff only punishable for taking it. To the first of the Questions the Court seemed to be in a good Deal of Doubt; but at last Judge Reynolds said, that Bonds to the Sheriff are not given as a Security for the Debt, but only for the Party's Appearance; and therefore he could not see much Reason there was for the Statute, considering the Estimate of the Penalty of the Bond to be according to double the Sum; but he thought the proper Regulation of it was according to the very Sum sworn to. And he said, that before this Statute, he believed, it was a very common Thing for the Sheriff to take little more than the Sum contained in the Ac etiam. However, as to the other Question, the Chief Justice as well as Judge Reynolds seemed to think it would be hard to avoid the Bond upon this Account. However the Court ordered these Matters to stand over.

Ellis and Moon.

What shall
be said to be
a good set-
ting out of
an Assign-
ment of a
Term, in
Pleading.

IN Covenant upon two Indentures, the Plaintiff set forth the Indentures of Demise between the Defendant and one Kosier, and that Kosier being so possessed postea totum Interesse, status, &c. devenit per assignationem to the Defendant. The Defendant pleads, that Kosier did not assign to him; & hoc petit quod inquiratur per Patriam. Issue being joined upon this, and Verdict found for the Plaintiff, it was moved in Arrest of Judgment, that the Plaintiff had not averred, that Kosier did assign to the Defendant, and therefore the Issue joined upon this was a void Issue, being upon a Fact never controverted. Serjeant Chapel said, that it was a Point unquestionable, that a general setting out of an Assignment of a Term by a Reversioner per medias assignationes is good; and he observed, that the present Case was nothing more; and therefore the Defendant did wrong in trying the Plaintiff up in the Manner he did; and consequently the Issue was void. But the Court said, that they did not see, but they might take Assignationem for Assignationem, and if so, they would refer it to him, who was last possessed; then the Meaning might very well be, that Kosier was possessed, and from him the Terms came by Assignment, that is, he assigned, to the Defendant. However it stood over.

Vide post

Hetherington and Lowther.

How far the
Court will
not set aside
a Plea of
Privilege.

THE Plaintiff was an Attorney of this Court, and sued the Defendant by Writ of Privilege; the Defendant was an Attorney of the Court of Common Pleas, and he pleaded, that for that Reason he ought to be sued no where else. Mr. Strange said,

said, that no Rule was more known, than that where the Plaintiff and Defendant are both privileged Persons, the Plaintiff's Privilege shall be allowed; and therefore he moved, that the Court would set the Plea aside, as it was merely Dilatory. The Court said, that it has been a Question formerly disputed, whether such a Plea was not good; and therefore to be sure, they would not now set it aside as frivolous. However if Mr. Strange could find any Cases to warrant his Motion, they told him he might move it again.

Appleyard and Hay.

IN Debt upon Bond, the Defendant pleads, that the Condition was for Payment of 5 l. per Ann. for eight Years together, and avers, that he had a Commission of Bankruptcy taken out against him, and after that, and before his Certificate signed, he gave this Bond to the Plaintiff for the Security of a greater Debt, to the Intent that the Plaintiff would sign his Certificate. He pleads, that he conformed himself in all Things to the several Acts of Parliament relating to Bankruptcy, that his Certificate was signed, and demands Judgment if he ought, &c. The Plaintiff replies, and traverses, that the Defendant gave this Bond for the Security of a greater Debt, to the Intent that the Plaintiff would sign his Certificate. Upon this, Issue is joined, and a Verdict for the Plaintiff in the Words of the Traverse; and Judgment given accordingly in the Common Pleas. Error being now brought, Mr. Draper took two Exceptions; one that Debt would not lie till all the Days of Payment were over, and to this Purpose quoted C. L. 47. the other, that that Part of the Plea relating to the Bond's being given for the Security of a greater Debt was Surplusage and intirely immaterial; that for that Reason the Plaintiff ought to have tied the Defendant up to the Proof of this by the Traverse; and consequently that the Verdict finding that this was not done with the Intent abovementioned, it was void likewise. The Court said, that there was nothing in the first Objection; for Lord Coke is to be understood of a single Bond, payable at different Times; and there indeed the Action cannot be brought till all the Days are over; because the Duty is intire, and the several Payments are the several Descriptions of it; and therefore till all the Days are over it is not a complete Duty; and consequently no Action till then can lie; but in the present Case the Duty is complete by the very Delivery of the Bond; and the Party only agrees, that he will bring no Action upon it, if such Payments be made to him; but when there is a Default made in any of the Payments, he is no longer under a Restraint from bringing of his Action. Upon which Mr. Fazacherly began to give an Answer to the second Objection. He said, he did allow, that it was not material, whether the Debt was greater or less, which the Bond was given to secure, or whether it was given to secure any Debt at all, but merely a voluntary Reward to induce the Plaintiff

Within what
Time an
Action may
be brought
upon a Bond.

to

to sign the Certificate; but yet he thought, when the Defendant had averred the particular Consideration, which the Bond was given upon, he was tied up to the Proof of it. And to this Purpose he applied the Case in Yelv. 195. Upon the whole Matter, the Court thought the Pleading right in the present Case, and accordingly affirmed the Judgment.

Lisne and Moody.

The Remedy for taking an unreasonable Distress.

THIS was an Action of Trespass for breaking into the Plaintiff's House, and taking an unreasonable Distress. The Jury gave 176l. Damages to the Plaintiff for the Distress, and 1d. for breaking the House. The Plaintiff released the 1d. and took Judgment for the Residue. A Writ of Error having been brought, Mr. Lee said, that Trespass would not lie for an unreasonable Distress; for a Distress is given originally by the Agreement of the Party; and therefore the Abusing that cannot make the first Act unlawful; but an Action upon the Case is the only Remedy. To this Purpose he applied 2 Inst. 107. He observed too, that he did not know, that there was even that Remedy till the Statute of Marlbridge 4. and if that was so, he thought it was beyond Question, that Trespass could not lie by Construction since; for the Statute says only, that the Person taking such Distress shall be amerced, and in this Action he would be fined. And he thought a clear Argument might be made in Proof of this by a like Case in 3 Lev. 48. However Mr. Reeves said, that he did not see, but Trespass would lie merely for taking an unreasonable Distress; for a Distress is given by the Authority of the Law, and the Abusing that makes the whole Act illegal. To this Purpose he cited 6 Co. 46. He said farther, that it was pretty clear, that there was a Remedy for this Oppression at Common Law; and this appears by 13 Rep. 2. 11 Rep. 44. The Act done appears by these Cases to have been illegal; and therefore as it was begun by the Authority of the Law, he thought the Consequence must be, that it is rendered tortious from the beginning. But however, he said, in the present Case there was a mere tortious Act of breaking the House, distinct from the taking the Distress; and it appears so to be by there being separate Damages given, and a Remittitur entered as to that; and if that was so, the Consequence, he said, was manifest, that the Unreasonableness of the Distress may be well considered as laid in Aggravation of Damages. To this Purpose is Smith and Newman, Salk. 639. Dicks and Brookes, Trin. 3 Geo. 1. The Court said, that they thought there was a clear Remedy for this Wrong by Action upon the Case; but they thought it as plain, that there was no Remedy by Trespass. They observed, that a Distress was a Privilege given by the Law, that the Excessiveness of it was no new Act distinct from the former, but a Continuation, though unreasonably so, of the old one. Then as to the Manner of laying the present Action the Court said, they thought the Gift of the Action was the unreasonable Distress, that

that the breaking of the House was only a Circumstance of taking it; and that it was highly improper to consider the Distress by Way of Aggravation to the Entry, and by that Means make the Entry the Principal. And the Chief Justice said, that he thought one Thing absolutely proved it; for there is no Pretence to say, but a Bar in this Action, admitting it had been the proper one, would have been a Bar to any Action for the Unreasonableness of the Distress; whereas if it had been laid only to aggravate the Damages it could not do so; because it is intirely uncertain, whether any Thing is given by the Jury upon that Account. However the Court ordered this Matter to be spoke to again, as it was a Writ of Error only upon a Judgment by Default. And the next Term the Court were of Opinion, that no Action of Trespals would lie. The Chief Justice said, that he did not know, but an Action upon the Case might lie at Common Law; but Judge Reynolds and J. Probin said in general in their Arguments, that they did not know there was any Remedy before the Statute. Accordingly the Judgment was reversed.

Ward and Baynam.

MR. Filmer moved to set aside a Judgment in a special Bill of Middlesex; because the Declaration was laid in London, and yet the Defendant was not allowed an Imparlane. And he said, he thought it a general Rule, that where the Writ is directed to the Sheriff of one County, and the Venue laid in another, the Defendant is intitled to imparle. Mr. Strange on the other Side said, that the Sheriffs of London and Middlesex were the same, and therefore this might differ from other Cases. But however the Party might have been intitled to an Imparlane, if he had regularly demanded it, he said, the Judgment ought not to be set aside, when he had omitted the Time for demanding it. The Court said, that in the present Case if this had been by special Original, it is a known Rule, the Defendant would have been intitled to an Imparlane; and the Design of special Bills is, that they should be upon the same Footing as special Originals. And as to this Application being after Judgment, they said, it was enough to shew that the Judgment was irregular. Accordingly the Court set the Judgment aside.

Where a Defendant shall be intitled to an Imparlane.



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— and Younger.

When a Writ of Execution is to be made out against an Ecclesiastical Person, whom the Writ must be directed to.

THE Sheriff of Wilts had returned upon a Fieri facias, that the Defendant was Ecclesiasticus beneficiatus non habens laicum feodum. Upon which a Writ issued to the Dean of Sarum, who had a Peculiar, to sequester the Goods upon the Defendant's Benefice. A Rule had been made upon him to return his Writ. But upon the Return's being insufficient, and the Plaintiff finding that the Official claimed the Retorna brevium by a Patent from the Crown, he obtained a Rule upon the Official to make a Return, and accordingly gave him the Writ; but now the Official made a Return, and sent up no Writ at all. Upon which Mr. Gapper moved now for an Attachment against him for a Contempt. But the Court said, that the Rule, which the Plaintiff had obtained upon the Official to make this Return was irregular; for they said their Writs could only be directed to the Bishop, or the Peculiar, and they could not take Notice of any subordinate Officers in a Peculiar. Accordingly they discharged their first Rule upon the Official, and made a Peremptory one upon the Dean to make a Return; and they said, he would find a Way to get the Writ from the Official.

Paterfon and Huddleston.

What shall be a good Plea by an Executor.

DEBT upon an Obligation was brought against the Defendant as Executor. The Defendant pleads a Recovery against him already had in placito debiti, and that he had no Notice of this Bond at that Time, and that there was no more in his Hands than would satisfy this Recovery. Upon which the Plaintiff demurs. The Chief Justice said, that he was of Opinion, that the Defendant's Plea might well be understood of a Recovery in Debt upon Bond, or other Matter of as high Nature; and if so, it was beyond Question that the Plaintiff ought to be barred. But however the Court unanimously agreed that if the Plea was to be understood of a Recovery upon a simple Contract, the Recovery would be a good Bar, as the Defendant had no Notice of the Obligation. In this, they said, consists the Difference between Duties of a private Nature and Duties upon Record; for those the Court did allow that Executors are bound to take Notice of at all Events, but these they need not, where a Suit is commenced against them to recover Debts of an inferior Nature. They said too, that there was no Occasion that Executors should hold out a Suit to the last, before they make such Payments; but if an Action is taken out against them, it is the same. However the Court did allow, that if an Executor makes a voluntary Payment of a Debt by simple Contract where there are not Assets to satisfy the Bond Debts, it is otherwise, though he has no Notice; for there are many Cases, where a Man's voluntary Act shall prejudice him, where the Necessity of Law would not. Upon the whole Judgment was given for the Defendant.

Bellue and Pew.

MR. Portescue being retained to oppose the Motion before made, he desired to know the Foundation upon which the Defendant's Counsel went, as he was not in Court at the Time the Rule was made for shewing Cause. Judge Reynolds explained it, but represented it in a more general Light than what I thought the Counsel put it upon before. He said, he took the Foundation of the Motion to have been to prevent one of their Rules being evaded, which allowed Proceedings to be staid in Debt and such other certain Actions, upon bringing into Court what the Plaintiff had declared for with Interest and Costs. And he said, if in such Cases Proceedings were not allowed to be staid upon one Count, by bringing into Court what is due upon that Count with Interest and Costs, their Rule would be intirely rendered ineffectual. *Salk. 596.* Vide ante 189.
Vide post.

Rush and Riggs.

A Motion was made to set aside a Verdict for want of Notice of Trial; but it appearing that the Notice was given to him who had been concerned in the Cause, though the Attorney told the Plaintiff he would have nothing farther to do in it, the Court held the Notice to be regular; for the Court said, he who was first concerned in the Cause shall be considered to continue Attorney in it, till Notice is given to the Plaintiff of another. Who shall be said to be the Attorney in a Cause.

Patson and Wilson.

IN Debt upon a Recognizance against Bail, the Plaintiff sets forth that a Bill was exhibited against one Selwood, and that the Defendant became Bail for him; the Plaintiff farther declares, that by that Record it set out, that Wilson appeared, and that the Cause proceeded so far, that the Plaintiff obtained Judgment against Selwood; he says farther, that a Capias was taken out against Selwood, but he did not appear upon it; upon which the Bail was now sued. Mr. Boole the Younger took an Exception, that it appears by the Record, that Wilson appeared instead of Selwood, which is a plain Error; and he said, the Bail have no other Way of taking Advantage of this Mistake but this upon Demurrer. However the Court over-ruled him; for they said, this Error does not make the Record void, but voidable, and therefore till the Judgment is reversed upon a Writ of Error, the Bail is liable; and accordingly gave Judgment for the Plaintiff. *2 Ven. 143.* How far Bail are liable.

Langley and Pether.

What Things
the Court of
King's
Bench may
hold Plea in
by original
Writ.

IN an Assumpsit the Defendant demurred specially, because the Plaintiff had not declared against him in Custodia Marefcalli; and Mr. Kettleby said, that no Original will lie in the King's Bench unless it is vi & armis, and therefore this Action would not lie here. To this Purpose he applied 2 Inst. 23. 4 Inst. 71, 76. Fitzh. N. B. 204. 1 Roll. 536. But Mr. Draper said, that the Precedents have been so many, and especially lately in this Way, that it would be a Thing of the most dangerous Consequence, if this Exception was allowed. And besides, he said, that in the present Case the Defendant cannot be intitled to take it, because he has not pleaded it to the Jurisdiction of the Court, but demurred in Bar. The Court said, that they believed Precedents might be shewn so far back as Hen. 6.'s Time of this Court's holding original Jurisdiction in Assumpsits, and therefore they thought it was not fit for this Court to give Judgment now to the contrary for the unknown Confusion that might attend it. A Thing of this Nature is only fit for the Exercise of the Parliament's Authority, who can confirm what already has been done, at the same Time that they Order the contrary for the Future. Accordingly gave Judgment for the Plaintiff.

Anonymus.

How far the
Court will
not quash a
Writ of Er-
ror; but re-
quire the
Party to
plead to it.

MR. Kettleby moved to quash a Writ of Error for its being taken out above twenty Years since the Judgment, contrary to the Stat. of 10 & 11 Will. 3. But the Court said, there are Exceptions in that Statute the same as are in that of Limitations in 21 Jac. 1. accordingly told him he must plead the Stat. to give the Plaintiff an Opportunity of taking Benefit of the Exception.

Boston and Forest.

Vide ante
181.

MR. Fazakerly and Mr. Lee now made their Arguments upon this Case. Mr. Fazakerly said, that he did not know, whether it would be necessary for him to endeavour to shew, that the Bond was void; because the present Action was not brought by the Sheriff, but by the Plaintiff in the original Action. Now he observed, that the Plaintiff in the original Action could not intitle himself to this, but by bringing himself within the Terms of the Statute for the Amendment of the Law. This Statute indeed does allow of the Assignment of Bail-Bonds; but then it must be understood only of such as are lawfully taken; and therefore if any Bond was given contrary to the Statute of Hen. 6. this Statute has always been construed not to extend to it. Now the Statute of 12 Geo. 1. which the present Question is upon, has only added some other Restraints to these Bonds besides those required of them before. And therefore he said, that it is equally necessary, that

a Bail-

a Bail-Bond should be made in Pursuance of this Statute, to bring it within the Intent of the Statute for the Amendment of the Law, and that it should be made in Pursuance of the first Statute. But that the present Bond was not within the Meaning of the last Statute, he said, was plain; because the Words of it are, that such Bonds shall be for the Sum sworn to be due and no more. And he observed that these Bonds were always given as a Security for the Appearance of the Party, and not as a Security for the Debt, and therefore there was no Colour that such Bond should be taken in double the Sum; and consequently the Words (for the Sum) must be understood the same as if they had been (in the Sum). This Argument Mr. Fazakerly said, was sufficient to determine the present Question; however to make it more clear, he offered a Reason to shew that the Case would have been the same, if the Action had been brought by the Sheriff himself; because he had no Authority to take Bail at all in these Cases at Common Law, and the Bonds he does take are only by the Authority of Parliament. Now, he said, where these Bonds are not within these Statutes, they must be considered as unlawful Bonds; and then this Case must fall under a general Principle of the Common Law, that Securities taken unlawfully by any Officer under Colour of legal Authority are void in themselves, (they being considered as taken by Extortion) and consequently when they appear so upon Record the Party may demur generally, and demand whether he shall be required to give an Answer. To the first of these Objections, Mr. Lee said, that the true Design of this Act of Parliament, which the Question turns upon, was, to prevent Persons being held to Bail by the Sheriff in the Sum the Action is brought for, which was the Practice then; and it has provided therefore, that no Person should be held to Bail in any greater Sum, than the Plaintiff should swear was his Due. Now he observed, that nothing could be a more natural Construction upon this Act, than that as before the Bail taken by the Sheriff was for double the Sum in the *Ac etiam*; so now the Bail taken by him should be for double the Sum sworn to; and this, he said, equally regulated the Sum as if it should be exactly the same. To the second Objection he said, that there were Cases where Acts were held to be illegal by Statute Law as well as the Common Law, and yet not allowed to be void, but punishable in a proper Manner; and to this Purpose he applied a Case in 2 Inst. 131. Judge Page said, that he thought it unquestionable, that the Bond was not assignable in the present Case, if it did not clearly comply with the Intent of this last Act of Parliament; but he thought it did for the Reason just before-mentioned by Mr. Lee, and compared it to the Case of the *Ac etiam*. The rest of the Court were of Opinion, that the Bond was not within the Act, as the Intent of Bail-Bonds is not to secure the Debt, but the Appearance of the Party; and therefore whatever the Practice might have been before of the Sheriff's Taking double the Sum in the *Ac etiam*, they thought that was not a Regulation, which he was confined to by the Law, but merely a voluntary

Vide post

tary one chose by himself to be a Guide to his Discretion; for before, if the Sheriff had held the Party to Bail in any Sum, he was only punishable for his Oppression, but the Bond could not be avoided. As this then is to be taken to be a Bond not within the Meaning of this last Statute, they thought it was not assignable, no more than a Bond not regulated according to the Restrictions of the first Act. However this Matter was ordered to stand over.

Sir Henry Goring and Goring.

How far the
obtaining a
Trial at Bar
is a Matter
of Right and
not of Fa-
vour.

ON Rule to shew Cause, why there should not be a Trial at Bar in this Case, the Counsel for the Plaintiff said, that the Defendant claimed as Heir at Law, and Devisee, but he was a Papist, and the Plaintiff was the Protestant Heir, and claim'd under the late Act in Relation to Papists. However they said, that there was great Reason to suspect there being Terms for Years secretly kept on Foot, and so the Plaintiff will be likely to be non-suited. For which Reason they hoped the Court would not require this Trial to be at the Bar, unless the Defendant would enter into a Rule not to give such fraudulent Terms in Evidence. The Court said, here are the two general Reasons for Trials at Bar in the present Case, Length of Examination, and the Consequence of the Cause, and therefore they did not know they could put any Terms upon the Defendant in making this Rule. But the Court said, if the Counsel were apprehensive of what they suggest, the proper Application was in Chancery for a Discovery of these Deeds.

Hurs and Fenn.

How far the
Court cannot
make an
Order upon
an Officer of
theirs, to re-
fund Money
which he
has received.

THE Defendant was a Prisoner in the Counter, and intending to turn himself over to the King's Bench Prison gave the Marshal six Guineas in Hand upon his agreeing with him, that he should have the Benefit of the Rules; upon which Mr. Birch moved, that as the Defendant had altered his Thoughts of turning himself over, the Court would make a Rule upon the Marshal to refund the Money, as this was taken by Virtue of his Office. The Court said, that if this Money had been taken by the Marshal at the Time the Defendant was his Prisoner, for proper Reasons they would have made such Rule; but in the present Case they could not. The Chief Justice absent.

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— and Revel.

MR. Fazakerly moved for a Rule upon the Associate to give them a Copy of the Minutes of a Special Verdict. But the Court said, the Judge that tried the Cause is to settle the Special Verdict, and therefore the proper Way of Proceeding would be to take out a Summons to order the Associate to attend before the Judge; and if he does not attend upon it, then the Application will be necessary to be made to the Court. So rejected the Motion.

What is the proper Method to be taken in order to settle a Special Verdict.

The King and Robe.

THE Order, upon which the former Rule was made, appeared now something different from what it did before. The first Part of it was a Declaration of the Justices Opinions, that the Patent only authorised the Defendant to be Clerk of the Market within ten Miles of the Place where the King constantly resides, and not within ten Miles of the Place where the King changes his Residence to for particular Times. Upon which they declared, that the Defendant exercised this Authority illegally at Uxbridge, and the Places thereabouts; and therefore they thought that Norwood the High Constable was to be justified in refusing to obey one of the Orders of the Defendant. Upon which they made an Order, that Money should be borrowed of the County-Treasurer to defend the Prosecution carried on by Robe against Norwood; and that it should be repaid out of certain Rents of Houses belonging to the County. Mr. Abney came now to shew Cause upon this Order; and he said he would not endeavour to maintain it, if it must be understood by the Order that the Money was to be repaid out of the County-Stock; because it is determined in Salk. 605. that the County-Stock is not to be applied to such Purposes; but he said, the County-Stock is that, which is in the Treasurer's Hands, collected by the Constables and paid over to him; and therefore it cannot be understood that it should be repaid out of that; but in fact, he said, the Money which is to reimburse the Treasurer, is to arise out of the Rents of Houses, settled in Trustees for the Benefit of the Justices of the County of Middlesex; which Money, he said, is appointed to be disposed of by them upon such Occasions as they shall think proper. The Court said, if this Matter had appeared so specially upon the Order, they should certainly have thought the Order had been good; but as it is not, they must take it for publick Money not to be applied to such particular Purposes. However the Chief Justice said, that the Order might go back, and the Justices might amend it; but at last the Court agreed they could not; because the Term was over which the Order was brought up in. The Court then considered how much of this Order they should quash. They agreed, that they would not quash the first Part of it, tho' it was the Foundation of the other; because it is meer Matter of private Opinion; and if they should, it would only give the Defendant's Party occasion to

Vide ante 165.

to triumph over the Justices unnecessarily; whereas they said, they thought it a laudable Design in the Justices to endeavour to correct the Abuses, they believed, were made by these Patentees. However Judge Reynolds said, that he did not see, but the next Part of the Order, which appointed the Money to be borrowed of the Treasurer, amounted to an Order upon him to lend it; and therefore that ought to be quashed. But the Rest of the Court did not think it had so extensive a Meaning, and therefore would not quash that neither. However all the Court agreed in quashing the last Part.

Dr. Bently and The Bishop of Ely.

The Construction to be put upon Statutes of Colleges.

LAST Term Dr. Bently moved for a Prohibition upon a Citation exhibited against him by the Bishop, as Visitor of the Mastership of Trinity College in Cambridge, at the Complaint of Mr. Johnson, one of the junior Fellows of that College. The Citation ordered the Doctor to appear before the Bishop at Ely-House in Holborn to answer certain Articles, that should be exhibited against him, for wasting the Revenue of the College, contrary to the fortieth Statute given them by Q. Elizabeth. This Statute provides in the Beginning of it against several great Offences, and says, if the Master shall commit any of them, he shall be twice admonished by the Vice-Master and seven senior Fellows; and if he shall not reclaim after that, he shall be expelled the College by the Visitor. Porro, says the Statute, if he shall waste the Revenue of the College, be guilty of Heresy, Murder, Treason, &c. he shall be expelled the College. Upon which the Doctor's Counsel said, that the Word Porro connects both Parts of the Statute together, and therefore it ought to receive an uniform Construction, that the Master should be admonished before the Bishop proceeds to Expulsion. And upon that they founded their Motion then for a Prohibition. But the Court said, that it would be a very unreasonable Thing to suppose, that the Person that gave these Statutes should design, that the Visitor should expel for these extraordinary Offences, and yet that he should not do it, but upon two previous Admonitions. For this Reason, they said, the Word Porro must intirely disjoin the two Sentences, and the one Part must not receive its Construction from the other; upon which they refused the Motion. The Doctor's Counsel came now, and informed the Court, that the Bishop had since exhibited his Articles, but that they differed very much from the Citation; and that all the Offences charged in them, were either collegiate Acts of the Body, which he could not be answerable for, or else they were such, for which the Statutes have provided particularly other Penalties. His Counsel said, that they had laid these Exceptions before the Bishop, and had likewise pleaded the late general Pardon, but he had over-ruled the Whole; for which Reason they were obliged to apply to this Court again to grant them a Prohibition. The Counsel of the other Side said, that if there should be Reason to grant a Prohibition as to some of these Articles, there would be none, they believed, to grant

grant it as to all; however they must be obliged to go thro' every distinct Article, which were sixty-four in Number, and therefore they prayed a Day till next Term to shew Cause. They desired too they might have a Rule to inspect the publick Books of the College and take Copies of them at their own Expence; the Court accordingly made a Rule to shew Cause; for they said, wherever a Visitor proceeds contrary to his Citation; or inflicts different Penalties from what the Statutes prescribe, this Court always grants their Prohibitions. And they said, they would grant the other Rule, though there was no Consent. The Doctor's Counsel then desired, that they might have Liberty to amend their Suggestion in any Matters of Form, if they should think it proper. The Court said, they could not allow them to amend it in Substance, unless the other Side would consent; because by Amending it in Substance it would be a new Suggestion, and therefore there must be a new Motion for a Prohibition. However it would be for the Interest of the other Side to consent to allow them to amend in Substance as well as Form, if there should be occasion for it; for if this Suggestion should be bad, the Doctor's Counsel would certainly make another, and so it would be a Means only of keeping off the End of this Affair longer; and therefore the Court advised the Bishop's Counsel to agree to it; and they did so accordingly, and a Fortnight's Time was allowed the D^r. to amend his Suggestion.

Goodright and Sturdy.

MR. Reeves moved for a Rule upon the Sheriff to make a Warrant to his Bailiff to execute a Writ of Possession immediately, though it is returnable next Term; for he said, else the other Side would influence the Sheriff not to execute it till the very End of the Vacation, and by that Means they should lose all the Benefit of the Crop, that is now upon the Ground. But the Court in the first Place said, that the Sheriff might execute the Writ himself, if he had a Mind to it; and therefore to be sure they could not make a Rule upon him to order his Bailiff to do it; but besides, they said, the Sheriff has by Law all the Time to execute the Process till the Return of the Writ, and therefore they could not confine him to do it in a shorter Time. Serjeant Darnel then afterwards moved on the other Side, that the Sheriff might make a Return to his first Writ, that was returnable in Easter-Term last; for under Pretence, that he had not executed that Writ, the Court had granted this Writ, which M^r. Reeves had just now moved about. Now he said, this was only a double Piece of Oppression, and therefore, he hoped the Court would require this Return. M^r. Reeves said, that they ought to have had Notice given them of this Motion; for this is not a Motion of Course, as it would have been, if the Plaintiff had made it; but here the Defendant moves, that the Sheriff may make Return to the Plaintiff's Writ. But the Court said, it is a Matter that concerns themselves to have an Obedience made to their own Process, and accordingly granted the Serjeant's Motion.

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The

The Archbishop of Canterbury *and* The Master, Fellows
and Scholars of Trinity-College in Cambridge.

The Time
which the
Court gives
to shew
Cause against
a Manda-
mus.

MR. Lee moved for Time till the next Term to shew Cause upon a Rule, that had been made for a Mandamus to be directed to Trinity-College to admit a Librarian, upon the Appointment of the Archbishop, he having this Power given him by the Statutes of the College. He said there would be a good Deal of Time necessary to be taken up in looking into several of these Statutes, to see whether the Bishop had such a Power or not; and the College were not served with this Rule till Friday last. The Court said, if this had been a Motion for Time to make a Return to a Mandamus, the Suggestion of Difficulty might have been very proper; but five Days Time was enough to shew Cause, why the Mandamus should not go. They said too, there can be no Prejudice to you by the going of the Mandamus; for if the Archbishop has not this Right, you will not be in Contempt by refusing to obey it. But there may be a Prejudice to the other Side; for if the Archbishop has this Right, the Librarian ought to be admitted immediately, and receive the Profits of his Office; which if he is not admitted to now, he will have no Remedy for.

Bridge and Henly.

THE Plaintiff had filed a Bill in this Court in Hillary-Term was Twelve-month; but the Defendant being a Member of Parliament could not be made to appear till Hillary-Term last, though the Plaintiff had taken out a special Summons against him and three Distringas; and then the Plaintiff could not declare against him, because the Parliament was sitting; but upon the Parliament's being prorogued the 14th of May, the Defendant was served with a Declaration the 15th, which was four Days before the End of Easter-Term; and in Easter Vacation the Plaintiff signed his Judgment for Want of a Plea. Mr. Fazakerly had obtained a Rule for shewing Cause why this Judgment should not be set aside, for there not having been an Imparance allowed the Defendant. Mr. Reeves now said, that he thought the Judgment was regular; for the present Proceeding is upon the Statute of 12 Will. 3. cap. 3. and this Act has provided a new Way of Proceeding against Members of Parliament during their Time of Privilege; and he observed, that was by Way of Bill, in the same Manner as against Officers of the Court. And he said, that where the Proceeding are by Way of Bill against an Officer he has not an Imparance, if the Declaration is delivered before four Days of the End of a Term. He observed this is the constant Practice in the Common Pleas; and where you proceed by Venire, it has been the constant Practice in the Exchequer. He said too, that since the late Rule made for regulating the Proceedings by special

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Latitat in this Court in the same Manner as the Proceedings are by special Clausum fregit in the Common Pleas, he thought it almost unquestionable, that the Proceedings here against Members of Parliament must be the same as they are in the Common Pleas; for a special Summons equally sets forth the Cause of Action as a special Latitat; and therefore there's the same Reason there should be equal Privileges. But the Court said, as to the Proceedings in the Exchequer by Venire, that was an old Method of Proceeding peculiar to that Court, and no Argument could be drawn from that. They said too, that till this Chancellor's Time, when he was Chief Justice of the Common Pleas, it was always taken for granted, that Imparlances were to be allowed in these Proceedings in that Court; because the general Practice of that Court was to grant them; and this was the Reason, why till that Time the constant Method was to proceed in the Exchequer. But the Chancellor's observing, that they had a Way of Proceeding in that Court against their own Officers by Bill, and in those Proceedings no Imparlance was allowed, the Court there thought it a natural Construction upon the Act, that there should be no Imparlance in these Proceedings neither; and by this means Business of this Sort came into that Court, as it was wholly almost in the Exchequer before. The Court then began to speak of these Proceedings in the King's Bench; but they only said in general, that till this new Rule, they thought an Imparlance was always necessary. Then as to the new Rule, the Court said, it clearly could not extend to the present Case; because the Bill was filed before it was made; and the Intention of it was only to concern Bills that should be filed from that Time. However they said, that if this Case had hapned since the new Rule, it would have been exactly as it is in the Common Pleas. Upon this the Court set aside the Judgment.

Anonymus.

MR. Abney moved for a Mandamus to be directed to the Conservators of Bedford Level to restore a Receiver. He said they were incorporated by the Statute of 15 Car. 2. and they are required to appoint a Collector and Receiver; he informed the Court, that they were only Officers at Will; but the Foundation upon which he made this Motion, he said, was, that the Receiver was not turned out by the Body. Accordingly the Court granted it.

How far a Mandamus will lie to restore an Officer.

The

The King *and* Harris and others.

The Method
which the
Court takes
in Criminal
Cases in or-
der to ascer-
tain the Identi-
ty of the
Person.

Several Persons of Brodesly in Cornwall had been found guilty upon an Information for a Riot; the Chief Justice's Warrant had been directed to take up one of them; and one of that Name was brought up the last Day of last Term upon it; but when it was moved, that the Court would pass Sentence upon him, he made Affidavit, that he was not concerned in the Riot, that he never knew of any Information against him, that he did not appear at the Trial any other Ways than as an indifferent Spectator; and that he never gave Authority to any Body to appear for him; and swore too, that there was another of the same Surname and Christian Name both in the same Town with him. Upon which the Court then discharged him upon a Recognizance he entered into to appear the last Day of this Term; and made a Rule, that it should be referred to Mr. Bellamy to see, whether he was the same Man as was convicted or not. He was now called upon this Recognizance; and Mr. Fortescue prayed he might be committed, upon one express Affidavit, that he was the same Person, and upon another from the Clerk in Court below, that he had Authority to appear from several of these Rioters, and that he verily believed this was one of them, but could not be certain. The Court said, that they thought the Method they had ordered this Matter to be put into was clearly the proper one; but however as this Person would not proceed in it, they gave their Opinions, that he was the Man; and accordingly committed him.

Rutter *and* Rexford and others.

How far the
Court will
allow a Judg-
ment to be
amended.

TRESPASS had been brought against several Defendants; all but one were found guilty; but by Mistake one of their Names was left out in the Judgment. A Writ of Error had been brought, but Non-pross'd, for the Errors being assigned *corum domino rege*, whereas they ought to have been assigned in *Camera Scaccarii*. Upon this Mr. Draper moved, that the Judgment might be amended; and the Court allowed it.

The King *and* The Parish of St. Stephenson in the County
of Bedford.

Vide ante
177.

MR. Fazackerly came now to shew Cause why the Order of Justices should not be quashed. He said, he never knew this Exception allowed, only in the Case of Indiaments; and he thought there was a particular Reason for that, which will not hold in the Case of Orders of Sessions. The Reason, he said, was, that Indiaments are not removed up to be quashed, but before Trial of the Fact, whereas Orders of Sessions are never removed up till after; and therefore, he observed, that it was necessary that the Place should be certainly set forth in an Indiament, that the Court may provide for the Trial of it; but there is nothing of this Reason in the present Case.

And

And as to the Objection about the Difficulty, that the Parties may lie under, by not knowing to the Justices of what County they are to appeal to; he said, if they were sensible that they were aggrieved, it was their Business to inquire from whom the Grievance comes. But the Court said, they thought it their Duty to see, that the Parties be not intangled with Difficulties no more than themselves; and accordingly were going to quash the Order; but Mr. Fazackerly making then another Objection, that the Certiorari was directed to the Justices of the County of Bedford, to remove up all Orders made by them, whereas this Order was made by the Justices of the Town of Bedford, the Court said, the Order was not properly removed before them, and therefore they did not do any Thing in it.

Anonymus.

MR. Lacey moved to set aside a Verdict for a Variance between the Copy of the Issue and the Record of Nisi prius; in that the Copy of the Issue was made up as of Trin. Term Anno secundo Georgii Secundi, but the Record of Nisi prius was made up as of Trin. Term Anno secundo & tertio Georgii Secundi; and he said, this Mistake happened from the Beginning of the Term's falling in the second Year of the King, and the End of the Term's falling in the Third, and no Defence upon this was made at the Trial. And J. Reynolds said, he remembered a Verdict set aside in the Common Pleas for the Copy of the Issue's being Magnæ Britanniae, and the Record of Nisi prius Angliæ, Scotiæ, &c. However, Mr. Masterman said, that if this was a Mistake, it would be in the Clerk of the Treasury, and not in the Defendant's Attorney; for he always makes up the Stiles of the Record; but he said besides, that the constant Method of making up the Stiles of the Record in such Cases as this, is to make them up as in the present Case. Accordingly the Court refused to set the Verdict aside.

How far the Court will not set aside a Verdict for a Variance between the Record of Nisi prius and the Copy of the Issue.

Tashburn and Kirsher.

MR. Lee moved, that the Lessor of the Plaintiff in Ejectment might give Security for the Payment of his Costs, if they should go against him, he living in Ireland. The Court said, this is a common Motion in Equity; and even though the Plaintiff lives only in Scotland; but they never knew it done in a Court of Law.

How far the Court will not require a Person to give Security for paying the Costs of Suit.

Anonymus.

When an
Action is
brought by
an Assignee of
a Bail-Bond,
upon what
Terms the
Court will
stay Proceed-
ings in the
Action.

Serjeant Shepherd moved to stay Proceedings upon an Assignment of a Bail-Bond, upon entering into a Rule to plead the general Issue, taking Notice of Trial within Term, and giving Judgment upon the Bail-Bond to stand for a Security; and as this Case is, he said, the Plaintiff would have no Delay. The Court said, this Proposal must be understood of giving three Judgments upon the Bail-Bond, as there are three Persons jointly and severally bound in it; for there is no other Way in which the Intent of the Parties can be equally satisfied; because if an Action in treble the Sum should be brought against all three, and a Judgment had; that Judgment would survive from one to the other; and the Lien would not be reciprocal upon each of them and their Executors. But the Serjeant said, that the Costs of three Judgments would be too much, and therefore they chose rather, that the Plaintiff should go on.

Sir Thomas Calder and Rofs.

How far an
Action will
not lie in
England on
a Matter ar-
ising in Scot-
land.

The Remedy
for a Re-
ceiver.

The Remedy
against Se-
questrators.

A Scotch Lord had been attainted of Treason in the late Rebellion; but upon a Suit being commenced by his Creditors in the Court of Sessions to have Relief out of his Landed Estate, the Court there decreed, that it should be sequestered, and accordingly appointed the Plaintiff, being the Principal one, to be Receiver of the Profits. The Defendant had been Bailiff for some Time of this Estate; and upon the Plaintiff's meeting him at Edinborough, the Defendant acknowledged, that he was indebted to him in above 200 l. for the Profits he had received, and promised to pay him the Money, and offered to give him a Bond for it; but the Plaintiff would not accept of it; because he said, he should by that Means be answerable for this Money to the Creditors. The Defendant after this came into England with an Intent of going to the Bath; and upon that the Plaintiff arrested him here upon this Promise. And whether this Action was justifiable or not, was the Question before the Chief Justice at the Sittings at Guild-Hall. He said, that these Courts always ought to be cautious in allowing Proceedings here upon Matters arising between Persons who are governed by different Laws to prevent Confusion and Disorder between the Sentences of each Court. However, he observed, that the Courts of Law here have constantly given Relief upon general Matters of Contract, &c. where there is Relief given by the Laws of all Countries whatever. But in the present Case he took Notice, that this is not a Matter, which there is generally Relief for; because a Receiver appointed upon a Sequestration cannot recover the Profits by any Action, which were received by a Bailiff before a Sequestration granted; and if so, the Promise to pay this Money to such Receiver is void, being without a Consideration. He said, this was the constant Practice in the Court of Chancery; for the Receiver is only to gather in, and to bring it before

before a Master. But he allowed indeed, if there had been an Order in the Sequestration, that the Receiver should make Distribution amongst himself and the Rest of the Creditors as the Effects should come in, that might have given him an Authority to act as the Owner of the Estate would, and consequently he would have had a good Action against the Bailiff upon this Promise. And this he observed was the constant Distinction in the Court of Chancery; and in such Case the Receiver is not accountable to a Master. And if this had been the Case he did not know, but the present Suit might have been proper here. But he said, that it appeared, that this was not so, not only from the Order of Sequestration itself; but was very probable too from the Plaintiff's refusing to accept the Bond, and the Reason he gave for it; for by this he discovered, that he did not think himself accountable to distribute amongst himself and the Rest of the Creditors; but answerable only to the Court. And upon this the Plaintiff was nonsuited.

Dale and Lubbock.

THIS was an Action brought by an Indorsee of a Bill of Exchange against an Indorser, which had been drawn by one Mack Cleland upon one Mack Ceje. The first Part of the Evidence was to prove, that the Defendant indorsed this Note; now the Counsel could not do that directly; but the Evidence they offered as amounting to it was a Letter under the Defendant's Hand, wherein he writes to a Friend of his, that Mack Cleland had given him a Bill upon Mack Ceje, bearing Date such a Day, and payable to him or Order six Months after Date, and in all these Circumstances the Letter agreed with the Bill, though indeed there was no Sum mentioned in it, which the Bill was for. This the Counsel said was Evidence that the Defendant had the present Bill payable to him; then what they offered to shew, that he had indorsed it over, was a Confession from him himself, that he was come to Town to hasten on the Trial of an Action that was brought against him upon an Indorsement that he had made on a Bill of Exchange; and now the Counsel said, this very Cause was brought down by Proviso; so that it is strong Evidence that it is for the same Matter. The Chief Justice at theittings at Guild-Hall allowed this to be good Evidence of the Indorsement. And upon that the Counsel endeavoured to prove, that the Indorsee gave Notice to the Acceptor, that he must provide the Money before he commenced his Action against the Indorser; and this he did by sending him a Letter of it. But they said, as the present Case was, there could be no Occasion of giving the Acceptor Notice at all; for the Indorsee took a Bond as a Security from the Acceptor of the Bill, that he should not receive any Prejudice from it; and therefore there is not that Reason for giving Notice to the Acceptor, before you come upon the Indorser, as there is generally. But as to the first of these Points the Chief Justice said, he did not think the bare sending a Letter to the Post-house would be sufficient Evidence of Notice, without some further

When an Action is brought against an Indorsee of a Bill of Exchange, what shall be good Evidence in such Action.

further Proofs of the Acceptor's receiving it; and besides he said generally a personal Demand is expected. And as to the other of these Points Mr. Fazackerly said, he did not think the Acceptance of a Bond would be sufficient. For he observed, that in all Cases where an Indorser pays a Bill he has a Remedy over against the Acceptor; and now in this Case he has only an additional one; and as it is a known Thing, that the Remedy over upon the Note will not be sufficient, he could not see how the Remedy over upon the Bond could. However, he said, he did allow, that if the Acceptor had paid the Money upon the Bill to the Indorser, that would have made the Defendant absolutely liable. The Chief Justice said, that this was a Point, that deserved to be thought of, and therefore he directed the Jury to give a Verdict for the Plaintiff subject to his Opinion of this Point of Law.

Juny and his Wife against Glover.

When an Action is brought upon 22 & 23 Car. 2. cap. 9. sect. 136. Which was made to prevent vexatious Suits, what shall be good Evidence in such Action.

THIS was an Action on the Statute of 22 & 23 Car. 2. cap. 9. sect. 136. for preventing frivolous Suits, and provides, that in Actions of Assault and Battery, &c. where the Damages given by the Jury do not exceed 12 d. no more Costs than Damages shall be awarded to the Plaintiff; and if Judgment be entered for more, it shall be void, and the Defendant shall be intitled to an Action upon this Statute. Upon Not guilty pleaded, the Evidence given for the Plaintiff was merely the Copy of a Record, wherein the now Defendant in an Action of Assault against the now Plaintiff had recovered 1 s. Damages and 40 s. given by the Jury for Costs, quæ dampna in toto se attingunt ad 41 s. And to prove the Damages, that the Plaintiff had suffered by the former Action, he produced the now Defendant's Attorney's Bill of Costs, which a Witness swore he knew the Plaintiff had paid. Mr. Reeves and Mr. Wynn, of Counsel with the Defendant, gave nothing in Evidence; but only objected, that the Evidence given for the Plaintiff did not maintain the Declaration. For it is therein expressly laid, that the Defendant had brought the former Action with an Intent to vex and molest the Plaintiff. Now they observed, that there had been no Evidence given, that the Suit was veratiously commenced. It appears, that there was a good Cause of Action, because the Plaintiff recovered; and it does not appear, that the Suit was veratious, because the Jury have given but 1 s. for Damages. But besides, they said, they thought the mere Verits were intirely against the Plaintiff, for the Statute says only, that no more Costs shall be awarded than Damages, where they are under 40 s. which can refer only to Costs awarded by the Court de incremento; for the Jury can't be said to award Costs. And this has long ago been so determined in the Case of Page and Kirk, 2 Ven. 36. And the Practice has been accordingly ever since. The Counsel took Notice farther of two Variances, between the Record set out in hæc verba in the Nisi prius Roll, and the Copy of the Record produced. In the Nisi prius Roll it was averred, that the now Defendant brought the former Action per nomen Elizabethæ Vid. whereas in the Copy of

of the Record it was entred *Elisabethæ Glover Vid. queritur*, &c. though in the Memorandum it was agreeable to the Record of *Nisi prius*; but they said, the Memorandum was only the Recital of the Bill, and not to be opposed to the Bill it self in *hæc verba*. Serjeant Hawkins indreaboured to avoid this Variance, by saying, that the Memorandum is *venit & profert in Cur'*, so that he might first appear by the Name of Elizabeth Widow, and bring the Bill by the Name of Elizabeth Glover, Widow. But the Chief Justice said, he did not know, there could be any other Appearance of a Plaintiff, than bringing the Bill in. The other Variance insisted upon, was, that in the End of the Declaration as set out in the *Nisi prius* Record in *hæc verba*, *the, &c.* is left out, for it concludes & *inde producit sectam*. And it was observed, that this was very material; for *the, &c.* implies the whole of the Plaintiff's Demand, as in this Case his Damages, &c. Upon the whole the Chief Justice said, that he thought this Case intirely depended upon the Construcion of the Statute of 22 & 23 Ch. 2. for though indeed the Plaintiff has averred the Suit to be veratious, yet he thought the Plaintiff need not prove that by exprels Evidence; because if the Construcion the Plaintiff contends for be right, the Law considers the Suit veratious. And as to that Matter he said, his own private Opinion indeed was, that there was not sufficient Reason to alter what has already been determined; but had he knew another Judge was of a different Opinion, he would consider of it. And therefore ordered a *Verdict* to be given for the Plaintiff, subject to his Determination on this Point, as well as on the Variances. But then, he said, there would be another Question as to the Damages, which the Jury are to give. For though the Plaintiff has paid his Attorney his whole Bill, and so has inclusively paid the now Defendant's Attorney's Bill, by which Means he may be said actually to have been damnified so much; yet possibly by Law a great Part of the Bill might have been struck off upon a Variation; and certainly therefore the Defendant who is a Stranger shall not be liable to Pay any more than the Plaintiff was obliged to. And upon this the Parties agreed, that a *Verdict* should be given for the Plaintiff for the whole, but that he should enter into a Rule to take Execution for no more than should be due upon the Master's Variation. Salk. 207, 208.

Sir Thomas Price and his Wife *ver.* Powel, Cornwall and others. Scacc.

SIR Thomas Powel entered into Articles of Agreement in 1693, by which he agreed to settle certain Lands to himself for Life, the Remainder to a Lady he then intended to marry for Life, the Remainder to Trustees to preserve contingent Interests, the Remainder to his first and other Sons in Tail Male of the Body of him and that Wife, the Remainder to the Heirs Male of the Body of him and any other Wife, the Remainder to the Heirs of the Body of the first Wife, with a Proviso of 3000*l.* to be raised out of the Estate for the Portion of the

When Marriage Articles are entered into, what kind of Settlements shall be directed by a Court of Equity to be made in pursuance of them.

Daughters by the first Marriage. Sir Thomas Powel afterwards marries this Lady, and then suffers a Common Recovery. After this he dies leaving no Issue Male; and then Sir Thomas Price marries his only Daughter by the first Center, who now join in bringing their Bill to set aside this Recovery, and pray that a Settlement may be made to the Issue Female of the first Marriage, and to the Heirs of their Bodies. The Counsel said, that they thought it a Case known in a Court of Equity, that where Marriage Articles are made and an Agreement thereby entered into to settle Lands upon the Husband for Life, the Remainder to the intended Wife, the Remainder to the Heirs Male of their Bodies, the Remainder to the Heirs of their Bodies generally, a Court of Equity will consider the Issue Male as Purchasers for a valuable Consideration, and in Consequence of that Decree the second Remainder to be to the Issue Male, and not to the Heirs Male; for such is the equitable Meaning of the Words, and a Court of Equity will mould the Settlement accordingly. The Counsel observed farther, that if this was so in the Case of the Male Issue, there was equal Reason it should be so in Case of the Females. And they said, they thought a stronger Case than this was very lately determined, the Name of it was West and Erressey. Articles had been made there to settle Lands upon a Man for Life without Impeachment of Waste, the Remainder to his intended Wife for Life, the Remainder to the Heirs Male of their Bodies, the Remainder to the Heirs of their Bodies generally. A Settlement was made before Marriage, reciting these Articles, to himself for Life without Impeachment of Waste, the Remainder to the intended Wife for Life, the Remainder to the first and other Sons in Tail Male, the Remainder to the Sons of the second Marriage in Tail Male, the Remainder to the Heirs of his Body by the first Wife. The Husband after this suffered a Recovery, and died leaving no Issue Male. West married a Daughter of that Marriage, and brought his Bill in this Court to set aside the Settlement for being made contrary to the Articles, though reciting that it was made in Pursuance of them, and farther prayed that a new Settlement might be directed to the Issue Female of that Marriage, and not by the general Words of the Heirs of that Marriage. This Court indeed dismissed the Bill; but upon an Appeal to the House of Lords they reversed the Decree, and ordered that a new Settlement should be made to the Issue Female in Pursuance of the Bill. The Chief Baron said, that he owned for his Part, he thought, there was a great deal of Difference between a Court of Equity's decreeing Lands to be settled to the Male Issue, and decreeing them to be settled to the Female; a Court of Equity might go so far as to consider the Issue Male Purchasers, for the evident Intent it is to be supposed the Party had, that his Estate should continue in his Name and Family; but no such Intent can be had in the other Case; and a very good Reason there is, that they should not be considered as Purchasers, that by this Means they might be kept under proper Obedience to their Father. And as to the Case cited, he said, the Resolution of Superior Courts might controul per-

haps a Decree he should be for making, but could never Influence his private Opinion. But be the general Laws of Courts of Equity in this Respect as they will, the whole Court unanimously agreed that as the Circumstances of this Case are, the Daughters of the first Marriage cannot be considered Purchasers; for there is a plain Difference in the Expressions in the Articles between the Limitation to the Sons of the first Marriage and the Limitation to the Daughters, and therefore there must be supposed a plain Difference in the Intent of the Parties. And especially too if it be considered, that the Expression as to the Daughters of the first Marriage and the Sons of the Second is the same; and there is no imaginable Foundation to think, that those Sons should be Purchasers, who were by the second Deed. They said too, that there was a Provision made out of the Estate for a Portion to the Daughters, that the Articles were drawn by Sir Tho. Powel, who was a Gentleman at the Bar, and it could not be thought, but he well knew the legal Distinction between Heirs and Issue. They said it deserved something to be considered, that the Articles were made above thirty Years ago, that many Conveyances had been made according to the legal Construction of them since, and that therefore it would be a very dangerous Thing for this Court now to direct a Settlement to be made contrary to this legal Understanding of the Words. And the whole Court in general agreed, that they never knew a Court of Equity decree contrary to the legal Construction of a Conveyance upon a supposed imaginary Intent of the Parties to the contrary. 2 Vern. 295. 1 Vern. 48. 2 Vern. 659, 671, 704.

Term.

Term. Mich.

3 Geo. II. 1729.

Castel *ver.* Bambridge and Corbet.

How far the
Court will
bail a Man
in an Appeal
of Murder.

BAmbridge had been indicted for the Murder of the Plaintiff's Husband, and thereupon was acquitted at the Old Baily. Upon this the Plaintiff brought an Appeal against him by Original, and charged him with it whilst he was there in Custody, and made Corbet a Defendant with him in the Action. This was the Day of the Return of the Writ, and Bambridge was now brought up by Habeas Corpus, to which Writ the Sheriffs of London returned, that they took him in Custody upon the Appeal, and brought him here accordingly; and to the Writ of Appeal they returned, that they had taken the Defendants Bodies, and that they remained in their Custody. The Defendants Counsel moved now, that the Return to the Writ of Appeal might be filed, and that the Defendants might be bailed, for there being a material Fault in the Writ. The Writ recited, quia Maria Castel vidua fecerit vos securos de clamore suo prosequendo per A. B. of such a Place and T. D. of such a Place; now the Counsel said, that they had an Affidavit to produce from these very Persons, that they had neither of them given these Pledges, and therefore the Sheriff had no Authority to take the Defendants in Custody. They did allow that Security might be given to the Custos Brevium in the Name of the King before the Issuing out of the Writ, and that would be sufficient Warrant for him to issue it forth, equally as if the Security was given to the Sheriff; but they said, one way or other real Pledges must be given, and there are two Forms of these Writs, which evidently shew it; one is, quia A. fecerit nos securos; the other, si A. fecerit vos securos. But the Counsel observed, that the Form of the present Writ was in neither Way, and therefore it was bad too upon that Account. They said, they had taken these same Exceptions in the Court of Chancery, and applied for a Superfedeas upon this very Affidavit. But the Lord Chancellor told them, that fecerit might have a future Construction and relate to the Sheriffs, and therefore they might take Advantage of this Exception more properly upon the Return. But the Court in the first Place said, that they thought the Habeas Corpus wholly unnecessary; for the Sheriffs of London were bound to bring the Defendants up to Westminster

her upon the Return of the Writ of Appeal. They said too, that the Sheriffs ought to have returned *paratos habeo*, and not remanent in Custodia; and for this Contempt in not obeying their Writ, made a Rule for an Attachment, unless they had both the Defendants here upon it to morrow. Then as to the Exceptions to the Writ, they said, the only Thing required by the Law was, that Pledges should be found, and at present they are to take it for granted, that Pledges have been found, because they thought the Writ fecerit could only have a præterperfect Construaion; and they said, they never knew, that a Fact suggested in a Writ could be falsified upon Motion. But however, they said, if Pledges were not yet given, they certainly would permit them to be given now, nay even at any Time before Judgment; and that notwithstanding the present Proceeding was by Original; for they could see no Difference in this Respect between its being by Original and its being by Bill, notwithstanding the Counsel endeavoured to make one. The Court accordingly refusing to grant the Motion upon this Foundation, the Appellant was ordered to come forth in Person, and have her Appearance recorded. The Sheriffs then amended their Return, and brought Corbet into Court too; upon which both the Defendants were brought to the Bar and there arraigned in French. The next Day the Appellant was called again, and then both Defendants put in a Plea of Not guilty upon double Stamps, which was required to be done, before the Court would receive it; and the Plea was read in French, and Issue joined in the same Manner. The Defendants then prayed a speedy Trial; but the Court said, there must be fifteen Days between the Teste and Return of the Venire, and fifteen Days between the Teste and Return of the Habeas Corpora, as the Fact is laid in London and the Proceeding is by Original; and the Appellant's Counsel would not Consent to have the Original now quashed and to proceed by Bill. Upon which the Appellees prayed, that they might be bailed in the mean Time; and their Counsel cited the Case of Armstrong and Lisle, Salk. 62. and many others, where the like had been done. But the Court said, that Case by no means came up to this; for there the Defendant had been before convicted upon an Indictment and Clergy allowed; and that Case, they said, was not within the Benefit of the Statute of 3 Hen. 7. c. 1. so that the Appeal was absolutely barred. But however, they thought there was sufficient Foundation still to bail Bambridge; because he had been already acquitted upon an Indictment, to the Satisfaction of the Judge who tried him; and where that is the Case, they thought this Court ought to give that regard to the Verdict of twelve Men, as to dismiss him upon his finding Sureties for his being amenable to them. But however, they said, there was no such favourable Circumstances offered in Respect of Corbet; and therefore as it stands indifferent, whether he is guilty or not, they thought, this Court ought not to bail him; for their Discretion ought not to be influenced by Inclination or Will, but to be directed by former Precedents and Resolutions; and they knew of none where this Court had gone so far. The Question then was, how many Bail was ne-

cessary for Bambridge to give. The Court said, that wherever a criminal Proceeding is originally against a Man on the Crown-side, or removed up there by Certiorari, the Court always require four Bail; but wherever the Proceeding is on the Civil-side, it is otherwise. And therefore they admitted, that if the Appeal had been lodged at either of the Sessions in London that have intervened since the Acquittal, and been removed up by Certiorari, they should have required four Persons. But then when the Bail offered to justify, the Court said, that there was no Bail-piece, and therefore they could not allow them, though it is otherwise on the Crown-side. But a Bail-piece being immediately sent for, the Court said it was their Duty to examine into the Circumstances of the Bail, though they should bind them Corpus pro Corpore. Accordingly they insisted, that they should both justify in 1000 l. a-piece. And though it was objected against one of them, that he was already bound for Bambridge in a Recognisance of 1000 l. yet the Court said, as that was not broken, it ought to be considered as no Debt upon him. Upon this the Bail entered into a Recognisance Body for Body, but in no Sum certain, that Bambridge should appear in Person craftino Animarum; and Corbet was committed to the Marshal. 1 Salk. 62. 2 Mod. 264.

Feilders *ver.* The Bishop of Winchester and others.

When a Bill is brought in Order to establish a Custom, how far the Court cannot establish it by Reason that the Custom proved by the Evidence materially differs from that which was set forth by the Bill.

Canc. **A** Bill was preferred in this Court to establish a Custom in a certain Manor, where the Plaintiff had Lands. The Bill set forth, that there was a Custom Time out of Mind for certain Lands in that Manor, whereof the Lands in Question were Parcel, to be leased out for three Lives, and that so soon as one of the Lives should drop, the then Tenant had Liberty to add a new Life compounding for a Fine. The Defendants denied, that there was any such Custom. Upon the Hearing of the Cause the Plaintiff read several Depositions; but in all of them it appeared, that it was Part of the Custom, that the Tenant should put in this Claim within the three next Courts after the Determination of the first Life. Upon which the Lord Chancellor said, that the Custom appearing upon the Evidence materially differed from the Custom set forth in the Bill, and therefore he could not decree for the Plaintiff. He said, this was not like the Case, where a Right of Common is claimed, and Issue is joined, whether there is a Right or not; there indeed he did allow, if Evidence was given of a Right of Common, paying a certain Rent, that Evidence would maintain the Issue; for a Right of Common is proved. But here, he said, the Question was, whether there was such a Custom as the Plaintiff makes Title under, and no such Custom is proved; but one very differently described. There was another Rule of Evidence mentioned in this Cause, and that happened upon the Defendant's Counsel offering to read a Deposition of one of the Plaintiff's Witnesses taken in another Cause contradicting a Deposition made by the same Witness in this Cause. But Mr. Lutwyche objected against the Reading of it, unless they could produce an Order of

of Court which they had obtained before for the doing of it; for, he said, it was a Rule in this Court, never to read Depositions taken in another Cause, without express Leave obtained before for the doing of it. The Chancellor allowed, that in general that Rule was unquestionably Right; but he said, the End of Reading this Deposition would only go to the Credit of the Witness; and in such Case he had known it often allowed; which he accordingly did in this Case. But upon the Matter before-mentioned the Bill was dismissed. 1 Vern. 53.

Cromwell *ver.* Griffith and Prescot.

Canc. **T**HE Plaintiff set forth in his Bill, that his Ancestor was seised of certain Copyhold Lands, which he had mortgaged to Prescot one of the Defendants, and at the same Time gave him a Bond for further Security; but by his Will made Griffith the other Defendant his Executor, and ordered him to discharge the Incumbrance, and at the same Time devised the Lands to the Plaintiff. The Plaintiff farther set forth, that Griffith did accordingly pay Part of this Money; and therefore prayed, that he might have the Possession of the Lands decreed to him upon his Payment of the Residue. The Defendant Griffith had obtained a Surrender of these Lands from Prescot upon lending him a Sum of Money; and that made him oppose the Bill by putting in an Answer, that there were several Debts owing by simple Contract, as well as this, and that no other Assets had come to his Hands, besides this Sum, which he had wholly paid to Prescot; whereas in Equity and good Conscience this Sum ought to have been distributed for the Benefit of the other Creditors as well as him; and therefore he had paid it in his own Wrong. Upon which he prayed, that these Lands might not be decreed to the Plaintiff, but upon going before a Master to see how much he had overpaid Prescot; and then if the Plaintiff would pay Prescot all that should be due to him, besides what he should have justly paid him, he was willing to surrender the Lands up to him. Lord Chancellor said, that it was true indeed where Bond-Creditors have satisfied themselves out of the Personal Estate, and there is not enough to satisfy the Creditors upon simple Contract, the Justice of a Court of Equity is such, that upon a Bill exhibited of this Matter by the inferior Creditors, they will relieve them out of the real Estate, so far as the superior Creditors might have had that Relief. But however, he said, the Payment itself would be good to the Bond-Creditors, and the Executor would be indemnified in making it. And therefore in the present Case, where the Mortgagee had a Bond for a farther Security, he said, the Payment of the Whole to him which came to the Executors was good; and accordingly decreed, that upon the Plaintiff's Payment of the Residue he should have the Land.

How far a Court of Equity gives Directions concerning the Marshalling of Assets.

Maskell Executor of ——— against Lukee and others.

The Time for
Payment of
a Legacy.

A Woman made her Will, and left a Legacy of 200l. to Lukee, a Son of one of the Defendants, to be paid him at his Age of twenty-one Years. However he happened to die at his Age of eleven Years, and accordingly one of the Defendants, Lukee his Father, took out Administration to him, and libelled in the Ecclesiastical Court for this Legacy. The Plaintiff being afraid, that the Ecclesiastical Courts would order him to pay this Legacy immediately, whereas in Justice and Reason it ought not to be paid till the Time comes, when the Infant would have been of Age, if he had lived, made a Motion in this Court for an Injunction to stay the Party from proceeding in the Court below. This Matter had been mentioned before; and then Lord Chancellor ordered the Counsel to give Notice to the other Side, and to move it again. Upon which Dr. Sayer now attended and opposed the Motion with the Solicitor General. Mr. Lutwyche and Mr. Melmowh were Counsel for the Plaintiff; and they said, the plain Intent of the Testatrix was, that the Infant should have no Benefit of the Will till his coming of Age, and then he would have a Right to receive the bare 200l. without any Interest. They said, if this was the Meaning of the Testatrix in Respect of the Infant, it must equally be her Meaning in respect of those who represent him. Accordingly they said, this Point was settled in a late Case in this Court, and affirmed upon an Appeal in the House of Lords. And they said, there was a plain Difference to be made between this Case, and that where Interest is to be paid from the Death of a Testator; there they allowed the Intent of the Will was to convey a present Benefit, and the Design of hindring him to have the Use of it was only that he might not do himself any Prejudice by having it in his present Disposal. As this then is the Design of the Clause, and the Reason of that Caution ceases by his Dying before he comes of that Age, there is no Reason, that his Representative should be under that Confinement. However, they said, they had Reason to fear the Ecclesiastical Courts would not consider the Thing in this Light, and therefore they applied for an Injunction. The Counsel of the other Side tho' said, that the Ecclesiastical Court had a Jurisdiction in this Case concurrent with this Court; and if the Party should find himself aggrieved, his Relief would be proper only to the Delegates by Way of Appeal. Lord Chancellor was of the same Opinion, and accordingly refused the Motion. 1 Vern. 230, 27. 2 Vern. 9. 199.

Holt and Ward.

What shall
be said to be
a Man's pro-
per Addition.

THE Defendant was sued by the Name of Nox Ward, Esq; and pleaded in Abatement Letters Patent from the late King, by which he had the Office given him of Clarencieux King at Arms; and therefore demanded Judgment for his not being styled Nox Ward Clarencieux. Mr. Strange said, that this was only

only the Name of his Office, like the Clerk of the Pells, &c. and as the Defendant had a good Name of Addition given him, he moved, that the Plea might be set aside. Accordingly the Court made a Rule to shew Cause to Morrow, 3 Cro. 224, 542. but afterwards discharged it, because there is something of Law in the Plea. Note; The Plea was by the Words, Creamus, coronamus & nomen imponimus Clarencieux Rex Heraldorum. Judge Page and Reynolds absent.

R. J. C. J. J. J.
247.

Fowler and Wathen, Administratrix.

MR. Strange moved, that the Court would make a Rule upon the Plaintiff to answer the Matters of an Affidavit. The Plaintiff was an Attorney, and Steward of a Hundred Court, and yet encouraged one joint Cause of Action to be split into several Actions to give his Court a Jurisdiction; and this too was done, and Judgment accordingly, in the Vacation Time, when no Application could be made to this Court for a Prohibition. The Court said, that would else be the proper Thing to pray, but, as the Circumstances of the Case were, ordered the Plaintiff to answer the Matters of the Affidavit.

How far the Court of King's Bench will order a Judge of an inferior Court to answer the Matters of an Affidavit.

The Vill of Appelthwaite in the Parish of Windermore
ver. The Vill of Hartfop and Batterdale in the Parish of Barton.

THIS was an Order of two Justices confirmed by the Sessions of the County of Westmorland. Mr. Reeves took an Exception to it for its being wrong directed. He said, there was a Clause in the Statute of 13 & 14 Car. 2. 12, 21. which provides, that the Wills in Westmorland, and some other large Counties in the North, shall take Care of their own Poor; and therefore this Order of Removal ought to have been directed to the Overseers of the Will of Appelthwaite, whereas it is directed to the Overseers of the Parish of Windermore. And accordingly the Court made a Rule to shew Cause, why the Order should not be quashed. Salk. 123.

Whom an Order of Removal is proper to be directed to.

Vide post.

Anonymus.

MR. Theede moved for an Information against Cawket a Pawn-broker for taking six Pence a Pound per Month Interest; which he said, was extravagant Usury. The Court said, they thought there was nothing so enormous in this Offence, but what the common Method of Punishment would be sufficient for. But then Mr. Theede said, that the Statute of Usury allows the Penalty for Usury to be recovered by Information or Action, and that would be a Reason, why the Court should grant it. The Court said, that was to be understood only of an Information qui tam. And farther observed, that the Statute chalking out a particular Method of Proceeding for a new Offence was a farther Reason why the Court could

How far the Court will not grant an Information for Usury.

When a Statute Prescribes a particular Method of recovering a Penalty, how far the Party cannot proceed by Way of Indictment.

H h h

could not grant an Information; neither can the Party be so much as indicted. 1 Mod. 34. 4 Mod. 145.

Birch and Leek.

Vide ante
S. C. 173.

UPON a Writ of Error on a Judgment given by Default in an Action of Trespass in the Common Pleas, Want of an Original was assigned for Error. A Certiorari was accordingly directed to the Custos Brevium, and he returned that there was no Original filed in the Term of the Placita. Upon Diminution alledged, a new Certiorari issued, and to that the Custos Brevium returned that there was an Original in placito prædicto of the Term precedent. In nullo est Erratum being now pleaded, Mr. Filmer took an Exception to the Writ returned, that it varied from the Declaration; for the Declaration was of a Trespass committed in the late King's Time, continued down to this King's; but the Original certified was of a Trespass contra pacem nostram, and tested likewise in this King's Time. And to make good this Exception he quoted a Case out of 2 Ven. 49. Then he said farther, that admitting the Original certified had been right in this Respect, yet it could not be taken to be an Original in this Cause, because there are no Continuances returned from the Term of which it is certified to the Term of the Placita; and he observed, that an Original not continued is as no Original. He took Notice likewise, that the present Judgment was given by Default, and therefore the Statute of Jeofails could not extend to it. Mr. Reeves on the other Side argued, that however specious the first Objection might be; because the Words contra pacem nostram may seem to be a Description of the Offence, and not thrown in barely to aggravate; yet, he said, at most the Description was imperfect, and not variant; for the Trespass declared of is a Trespass of this King's Time, though it is something more. He allowed, that the Trespass in the Original might have been described more agreeable to the Trespass in the Declaration by concluding contra pacem nostram, necnon contra pacem Georgii primi nuper Regis; but he observed, that the Want of this could never make the Original bad. To this Purpose is the Case in Syd. 253. and 6 Mod. 80. Mr. Reeves then said, that as he had answered the first Exception, he hoped he should give an Answer to the second. And that should be by quoting the Case of Rowning and Lord Cartwright, Hil. 3 Geo. 1. which he was of Counsel in, where this very Exception was taken, and over-ruled upon Debate. Accordingly the Roll was produced, which was 193, and found to be so. He said, the Reason of that Case was, that this Dimission was only a Discontinuance, and Discontinuances are helped by the Statute for the Amendment of the Law after Judgment by Nil dicit, as well as after a Verdict. The Chief Justice said, that for his own Part he thought there was a good deal in the second Objection, because an Original not continued down has no Reference to this Cause any more than to any other; and therefore he did not see why the Return of the Officer should be regarded in this Respect, who has certified, that

that it does belong to this Cause; for it can only be so according to his Judgment, and the Judgment of their Officers is nothing to be regarded in a Matter of Law. But however as the Case cited was adjudged upon Argument, the Court said, they would not over-rule it, and accordingly held the Original to be good, notwithstanding the second Exception; and upon the first it stood over. Salk. 267, 636.

Vide post
S. C.

Anonymus.

UPON a Judgment referred to the Master, he reported, that a Prisoner in Custody of the Marshal was served with a Declaration, but Rules were given him to plead before Affidavit filed of such Service. This, he said, was irregular; but because the Defendant had sued out a Writ of Error in Parliament, he doubted, whether he was not concluded from taking this Advantage of setting aside the Judgment upon Motion. And the Court was of the same Opinion.

How far a
Person can-
not move to
set aside a
Judgment af-
ter he has
brought a
Writ of Er-
ror.

Anonymus. Scacc.

A Man having got a Settlement in the Parish of A. and residing in the Parish of B. one of the Overseers of the Parish of A. gave a Bond of Indemnity to the Parish of B. to induce them to let the Man continue there longer. Afterwards he became chargeable to the Parish of B. and got a Settlement by continuing there so long. The Bond upon this was put in Suit, and the Parish had a Verdict upon it. Upon which the Defendant preferred a Bill of Injunction to prevent Execution of the Judgment, upon offering to pay the Plaintiffs what Loss they had already suffered by this Man, and to let the Judgment stand for a Security for what they might afterwards suffer. Counsel came now to dissolve the Injunction, and said, that this Man has since had a great Family of Children, who have by this Means likewise a Settlement in this Parish, and the Man himself is dead, so that they observed, it would be unreasonable to hinder the Plaintiffs taking Execution upon this Judgment, since by their Indulgence to the other Parish so great a Burden is settled upon themselves. The Court said, it was certainly unreasonable on the other hand, that the Plaintiffs should have Execution of the Penalty, if they can have Justice done them in any other Way; the Method of doing that may be proper to be considered of, when the Cause is set down for a Hearing. And Baron Carter said, he remembered a Northampton Case of this Sort before the late Master of the Rolls, and he made an Order, that the Overseer should be reimbursed what Loss he had suffered upon such an Occasion, by ordering the Parish to make a Rate to relieve him. Accordingly the Injunction was ordered to continue. 6 Mod. 97. Salk. 531.

How far a
Court of
Equity will
relieve a-
gainst a Pe-
nalty.

Def.

Desbrough and Crumbey. Scacc.

How far Sequestrators have no Authority to sell.

MR. Bumbery moved, that the Irregularity of a Sequestration might be referred to the Deputy, which was taken out against the Defendant for not appearing, by Reason of its being taken out sooner than by the Course of the Court it could; and yet the Sequestrators had taken the Goods off the Premises, and threatened to sell them. The Chief Baron said, that as to the carrying the Goods off the Premises, it was clear the Sequestrators could do that; because a Sequestration upon Mean Process answers to a Distringas at Law. But however as to the selling them, the Court agreed in the present Case it could not be lawful; and said, it had lately been settled upon Debate. And observed farther, that Courts of Equity could not authorize Sequestrators to sell Goods even upon a Decree till Lord Stamford's Act, which makes Decrees in this Respect equivalent to a Judgment. And even now the Counsel said, Sequestrators cannot sell, but upon Leave of the Court. However the Court said this was a Matter proper for them to consider upon another Occasion; and therefore only referred the Irregularity of the Sequestration as to the Point of Time to the Deputy.

The King and Hawks.

What shall be said to be a good Conviction for Deer-stealing.

THIS was a Conviction for Deer-stealing; and Mr. Fazackerly took two Exceptions to it; one that it was said, that the Defendant comparuit before the Justice, whereas it should have been comparer; the other, that it was said, & superinde convictus est secundum formam Statuti, without saying, & forisfaciat, &c. To the first he observed, that it was a Rule in all legal Proceedings, that the Fact must be laid as a present Translation, and not delivered by Way of Narration of what is already past, or what shall afterwards be. This, he said, was the Reason, why dedit Curiae hic intelligi & informari has always been held to be wrong. To the second he said, he did allow, that the Justices need not appoition of Penalty; nay if they should appoition it wrong, so far only, as they have given it wrong, this Court will set it aside, but confirm it as to the Rest. But he never knew, that this Court had gone so far, as to allow a Conviction to be good, where no Penalty at all was given; because, for the Justices to say, that they convict the Defendant, without saying what he shall forfeit, would be like the Courts above pronouncing Judgment against a Man for an Offence, without saying what he shall suffer. And accordingly this Exception was allowed in the Case of The Queen and Serle, and in that of The Queen and Hilgrave, Hil. 2 Ann. He observed farther, that the present Case was much stronger than either of these; for here are two Statutes relating to the Game, one in the 13th of Car. 2. 10. the other in 3 & 4 W. & M. 10. which this Conviction may equally be grounded upon; and the Justices certainly ought to have ascertained which of these Statutes was it, on which they proceeded; because the Court would otherwise be

in Doubt, whether the Justices have kept within the due Circumstances of Proceeding, which these Statutes have made necessary to a Conviction. To the first of these Objections Mr. Reeves answered; that it might be reasonable perhaps, that Judgments should be entered down as then immediately pronounced; because they are considered as the immediate Acts of the Court; but the Appearance of the Defendant is very often some Length of Time before the Judgment, and therefore he thought, that that Fact might very well be related as of a past Time. He said, that he himself took this Objection in the Case of The King and Hawkins, Mich. 3 Geo. I. where it was laid in the Conviction, that the Defendant comparat & allocatus fuit, and the Court over-ruled it. To the second he said, that the Forfeiture is a Consequence of Law upon the Conviction; it is what the King and the Informer have a Right to upon it, and therefore may very well be given here by the Court above. And he said, he has often heard the Case of The Queen and Serle denied to be Law. He observed farther, that it was by no Means clear, that the Statute of Car. was not repealed by that of W. & M. for the last Statute recites the Penalty in the first being too small for the Offence, and therefore gives a greater; which Act in all Reason and Sense must be understood therefore to alter and annul the first, since it finds Fault with that, and must therefore be understood to appoint one Penalty in the Room of the other. The Court said, that they thought this a just Observation upon the last Law. And as to the second Objection, they could easily get over that; but they thought the first Objection has been so often allowed, that they must shake many Authorities, if it should not prevail. But how ever it stood over. Salk. 378, 383. Vide post.

Hatton and Walker.

THE Defendant had pleaded the Statute of Limitations, but concluded his Plea, Unde petit Judicium sed querens Actionem habere suam debeat, instead of si. The Plaintiff upon this demurred specially. The Defendant being informed by his Counsel, that the Plea he signed was right, and not thinking that there could be such a Mistake in the Copy of the Plea delivered to the Clerk of the Papers, (though he did go to him to search, but was informed it was mislaid) joined in Demurrer. It happened tho' to appear upon farther Search, that the Copy of the Plea was wrong, and upon that Mr. Parker moved, that the Defendant might have Liberty to amend. A Rule was accordingly made to shew Cause. And now Mr. Kettleby said, that the Demurrer was made a Record of the Court; for it was joined in the Vacation; and all Demurrers are sent up and filed amongst the Records before the Eshoir-Day of the ensuing Term. He said too, that there was nothing in this Case to amend by; that the Plea was of the Statute of Limitations, and therefore ought not to be favoured; and that the proper Way had been for the Plaintiff to have applied to a Judge to have had it amended, before he returned the Paper-Book. Upon which Mr. Parker answered, that he could have an Affidavit made, that

How far the Court will allow an Amendment after a joinder in Demurrer.

the Plea delivered by the Counsel was right; that it was only a Mistake in the Attorney to Copy it wrong; and he said he believed, that Precedents might be produced of a Counsel's Draught being sufficient Warrant to amend a Record by. The Rule was accordingly enlarged to another Day; and then he said, that Serjeant Baynes had informed him of a Case, the Name of it was Doyley and in this Court, where the like Motion had been granted. That was in Replevin, where it appeared by the Avowry upon Record, that the Distress was taken before the Rent was due. Serjeant Knot then informed the Court, that the Plea was drawn by him, and in his Draught it was right; and though there had been a Demurrer to the Avowry, and all upon Record as here, the Court gave Liberty to have the Avowry amended. The Court said, that if that Case was so, it was very material; and upon that gave farther Leave to have the Rule enlarged, in order that that Precedent might be found. 1 Cro. 144. 1 Salk. 48, 86, 87.

Vide post.

Farrers and Cook.

How far the Court will not allow an Amendment of the Bail-piece.

MOITION was made to amend the Bail-piece, because by Mistake the Bail was given to an Action between Farrers and Cooke. But the Court said, that they could not do it but by Consent of the Bail.

Anonymous.

How far the Court will not allow Proceedings to be staid on bringing in to Court what is bona fide due.

DEBT in this Case was brought upon a Bond of 200l. the Defendant had several Demands likewise upon the Plaintiff, so that upon the Balance there was but 25l. owing to him. Upon which Mr. Coningsby moved, that he might bring this Sum, that was due upon the Balance, into Court; and he said, he thought this Motion was within the Meaning of the late Statute. The Court said, that the Statute had prescribed only two particular Ways of Proceeding; one, by pleading the Matter of Account specially; the other, by giving the special Matter in Evidence upon the general Issue. They said, they could not allow of any other Way of Proceeding; and accordingly refused the Motion.

Stephens and Houghton.

Vide ante 128.

THIS Case coming on again in the Paper, Mr. Lee took several Exceptions to the Avowry; first, that it is laid indeed, that the Plaintiff was an Inhabitant within the Leet at the Time of the Offence committed; but it is not said he was an Inhabitant at the Time of the Distress taken. Accordingly he quoted Cro. Eliz. 698, where it is held to be necessary, that the Party should be an Inhabitant at the Time of the Offence committed; and he thought there was equal Reason, that he should be so at the Time of the Punishment inflicted upon him for committing it. The second Exception was, that it is said in the Avowry, that the Jury presented the Plaintiff for these several Offences; but it is not averred, that he actually did

did them. He said, this has been held necessary in Moor 75. and in Cro. Eliz. 885. and in Carthew 73. Lord Ch. Ju. Holt takes the Distinction between Replevin and Trespass. In Trespass the Defendant only justifies himself for what he has done, and there he need not therefore be so particular; but in Replevin he is an Ador; and his being a Bailiff in the present Case can make no Difference; for he is to have a Return, if his Avowry be right, equally as if he was Principal. His last Exception was the same with the Third, that was taken upon the former Argument, that the Amercement ought to have been offered by another Jury; and quoted 3 Lev. 19. in Point. Mr. Wynn answered to the first of these Exceptions, that the Plaintiff's being an Inhabitant within the Leet at the Time of the Offence done was enough to give that Court full Jurisdiction. To the second he said, that he thought the Defendant's Justifying himself under the Authority of the Process of the Court below was a sufficient Answer; for he is not to inquire whether the Process issues out warrantably or not, but is obliged to obey it. And he quoted the Case of Marsh and Head, Mich. 3 Geo. 1. where this same Reason was given, why such a Justification was good in Trespass. Now, he said, the Court's giving this particular Reason in the Case of Trespass, was an Argument, that they thought the other common Reason of its being a Plea in Bar would not be sufficient. If then there is this Distinction between a Man's Justifying in his own Right and Justifying by the Order of a Court in the Case of Trespass, there is equal Reason, that there should be this Distinction in the Case of Replevin. And accordingly he quoted the Case out of 3 Cro. 748. But besides he observed that it was averred in General, licet ipse de separalibus Offensis sit culpabilis, and that was enough. To the third Exception he said, that the Jury in this Case have set the Amercement; and therefore there was no Reason why another Jury should offer it. To this Purpose he applied Lord Coke's Opinion in 8 Rep. 38. He said, indeed he did allow Lord Hobart was of a contrary one in that Book 129. but he observed, that that Opinion was denied to be Law in the Case of Matthews and Carey, by Lord Chief Justice Holt and Mr. Justice Eyre. The Court was of Opinion as to the first Exception, that Mr. Wynn's Answer was satisfactory. To the second they said, they thought the Distinction between Trespass and Replevin right. And they could not think the Averment by way of licet was sufficiently traversable. And besides the Chief Justice said, he thought the Averment was particularly bad in the present Case; because the Avowry had laid several Presentments, and several Amercements upon them, and yet but one Distress. Now he observed, that if this Averment should be good, and the Plaintiff join Issue upon it, if the Avowant should make one of his Presentments good, he must have a Return awarded of the intire Distress, taking it to be rightly made in the present Case; whereas the Averments ought to have been particular and distinct; several Distresses likewise ought to have been made, and the particular Issues might have been joined upon them, and then the Avowant ought to have had a Return but pro tanto as the Avowry should be good for. To the

the last Exception the Court was of Opinion, as it was made, that Mr. Wynn had given an Answer to it; but they said, the true Exception was, that this was a Presentment in a Court Leet, and the Judgment therefore ought to have been in general *ideo sit in misericordia* as the Act of the Court, and then that Amercement rendered certain; whereas in the present Case there is no such general Conclusion; but the Amercement is directly by the Jurors. This they said was certainly wrong; and in this a Court Leet differs from a Court Baron. And accordingly for these Exceptions the Court gave Judgment for the Plaintiff. 1 Salk. 56, 107.

Webb and Plummer.

What Matter a Person shall not be allowed to assign for Error by Reason of its being contrary to the Record.

UPON a Writ of Error on a Judgment in the Common Pleas, the Plaintiff had assigned for Error, that another Person was made Defendant with him in the Original Action, and that he died before the Day of Nisi prius. To this the Defendant pleaded *In nullo est Erratum*. And now Mr. Strange argued for him, that upon the Postea it was entered that all the Parties to the Original Action appeared there, and therefore the Plaintiff was concluded from taking this Averment against the Record. To this Purpose he quoted Rolls 758. where the Error assigned was that one of the Tales and one returned upon the Principal Panel were the same Person, they being of the same Name. But the Court there said, that as the Entry upon the Record was, that *alii de circumstantibus venerunt*, viz. such and such, they would not allow the Averment of one of them being the same. The same Answer, he said, was given to a like Error that was assigned in the Case of Held and Helbert, Hil. 12 Geo. 1. of one of the Jurors being not returned by the Sheriff. He did seem to intimate, that this was a little unlucky upon the Plaintiff here; because in Truth the other Defendant did die before the Day of Nisi prius; and it could have done the Plaintiff no Service to have assigned for Errors his dying between the Day of Nisi prius and the Day in Bank; for that is helped by Statute. The Court was of the same Opinion; so affirmed the Judgment.

The King and Child.

How far the Court will allow a Person to be bailed, who is brought up by Habeas Corpus.

THE Defendant was committed by a Justice of Peace for ravishing a Woman with Force and Threatning to kill her if she made a Discovery. Mr. Fazackerly and Mr. Kettleby said, that this Commitment was not certain enough to make the Offence Felony within the late Act of Parliament; for he said Force was the very Wit of the Offence, that made it so. Now, he said, that every common Struggle with a Girl may be said to be done with Force; but the Force within the Meaning of this Act of Parliament ought to be an extravagant Violence, and therefore should be particularly described. They said besides, that they had several Affidavits to produce in Favour of the Party, and in Discredit of the Woman; and one in particular of a Man's being present at the same Time, who swore that

that the Defendant only took a common indecent Liberty with her. They said therefore, that they prayed the Defendant might be bailed; for the Habeas Corpus Act requires, that every Person shall be so, unless for Felony particularly described: The Court said, that they thought the Commitment certain enough; but however upon hearing of the Affidavits, and the other Side's not attending, ordered the Defendant to be bailed. And accordingly he was so; four Persons entering into a Recognisance in the Sum of 100 l. and he himself in the Sum of 200 l.

Ammurst, Administrator of Lady Strode, *versus* Litton, Maskall and Brooke.

Litton *ver.* Ammurst, Maskall and Brooke.

Canc. **T**HESE two were cross Causes, and came to be heard together at the same Time. The Design of each of the Bills was to have two mortgaged Terms assigned irredeemably. These Causes had been heard before upon two Bills, and then the Chancellor decreed for Ammurst. Afterwards the Chancellor was of Opinion for Litton; but gave the Counsel of the other Side Liberty to have a Re-hearing, which accordingly was appointed for to Day; and now the Lord Chief Justice and Mr. Justice Denton were present in Court. The Attorney General opened the Case as Counsel for Litton upon the Petition of Rehearing in this Manner. Sir George Stroude was seised of the Lands in Question in Fee, and made two Mortgages for 1000 Years, and afterwards by his Will devised the Lands to his only Son Litton Litton in Tail Male, Remainder to Stroude Bedingsfield for Life, and to his first and every other Son in Tail Male, so that he should take upon him the Name of Stroude; and in Case he should not, then to George Darnelly for Life, and to his first and every other Son in Tail, so that he should take upon him that Name, the Remainder to his own right Heirs. Sir George Stroude died, and then his Son Litton became seised; and being so seised made his Will in Writing, and ordered his Executors to pay off and discharge the said Mortgages, and upon such Payment appointed the Mortgagees to assign the mortgaged Leases to his honoured Mother Lady Stroude for her sole Use and Benefit for the Remainder of the Terms. These Mortgages were one of them for 1150 l. the other for 500 l. and both of the same Lands. Then in the same Will he gave my Lady 2000 l. in Money. And in the End of the Will he gives all his Lands, Tenements and Hereditaments both in Law and Equity to his Son and his Heirs, if his Wife should happen to be with Child of one, and if it should prove a Daughter, then he devised to such Daughter 5000 l. to be paid out of the Rents and Profits of this Estate; and if he should happen to die leaving no Son, then he devised all the said Lands, &c. in Manner afore-mentioned to his Cousin Robinson Litton and his Heirs for ever. Litton Litton died soon after his making this Will,

How far a Mortgage shall be subject to a Redemption.

leaving no Issue, his Wife not being with Child. Stroude Beadingfield took upon him the Name of Stroude Stroude, and after the Death of Litton Litton died himself also without Issue. And now the Attorney said, that the Prayer of his Bill was, that upon Payment of the two several Sums with Interest by the Executors of Litton Litton, the Mortgagees might be compelled to assign to Ammurst the Administrator and late Husband of Lady Stroude, but redeemable by Robinson Litton; and that upon Robinson Litton's Payment of the Redemption-Money to the said Ammurst, the mortgaged Premises might afterwards be assigned to him. The Attorney General said, that he thought this Prayer was founded upon a natural Construction of this Last Will. But he observed, that the other Side contended, that the Meaning was, that these Mortgages should be intirely discharged, and that my Lady should enjoy these Terms of 1000 Years absolutely if she could; but if it should have happened, that Litton Litton had Sons, or Stroude Stroude had Male Issue, and either of them should have thought proper to have redeem'd, then at least she should have the Remainder of these Terms after the Determination of their several Estates, irredeemable by those that claimed as Heir to him. But the Attorney observed, that this was a strained Construction of the Will; for it was most highly probable at that Time, that one or other of them would have had Children, that some or other of them would have redeemed, and the Estate so redeemed by them might have continued in them always. At least so much was probable, that the Terms redeemed by them would have continued in them so long as that neither my Lady Stroude nor any she could have had any Kindness for, would have had Benefit by the Contingency. He then observed, that as the Benefit must be thought to be so very inconsiderable at that Time of the Will, it was highly unnatural to wrest the Words to so foreign a Sense; and he said, the Contingencies falling unexpectedly could make no Difference in the Construction of it. But he took Notice, that if the Words of the Will had been ever so express, the Construction contended for could not prevail according to the Rules of Law or Equity; for Lady Stroude would be possessed in Trust and subject to the Redemption of Litton Litton and his Issue Male, and then to Stroude Stroude and his Male Issue; now he said, the Provision afterwards of the Term to her own Use and Benefit must be absolutely void. Every Mortgagee is considered as possessed in Trust for the Mortgagee; because he is obliged to give an Account of all the Profits he has received upon tendering the Redemption-Money with Interest; and the Consequence of this is, that as my Lady must therefore have been designed at the Time of making the Will to have been possessed in Trust, and accountable to these two Persons and the Heirs of their Bodies, she cannot afterwards have the Benefit of the Residue of the Interest to her own Use. This would be to create a Perpetuity in Chattels. Indeed he did allow, that the Cases in Equity had gone so far as to allow of a Trust of a Term being given to one for Life, the Remainder to A. and the Heirs of his Body, and if A. shall happen to die without Issue in the Life of B. then to B. and the Heirs of his Body; the Remainder to B. would be

be good. And that was the Duke of Norfolk's Case, 1 Vern. 163. But the very Reason for that Case was; because the Contingency was confined to fall in the Life of B. or otherwise it would not be good. And that Case may well be maintained; because no more Persons can take before B. than if the Limitation to B. had been only after the Death of A. But, he said, in the present Case it would be no Answer to say, that there are no such Limitations of the Term in Trust; for if the legal Consequence of the Words must be such, it is the same Thing. The Solicitor General argued of the other Side, and said, that according to the Construction contended for by the Attorney, the mortgaged Terms must only be considered as given to Lady Stroude for the securing to her the Sums of 1150l. and 500l. Now Litton Litton has given her in the former Part of the Will 2000l. and can it be supposed likely, that he should have given her these three distinct Sums, when one of 3650l. would have done as well? To what Purpose too was it to order the Mortgages to be paid off, and assigned by the Mortgagees to Lady Stroude, if the Terms should equally continue incumbered in her Hands, as they were in the other's? This would be the most manifest impertinent Circuity; whereas the Devisor's Ordering, that the Mortgages should be discharged, naturally and plainly imports, that they should absolutely be dis-incumbered. And besides he orders, that the Remainders of the Terms shall be for the sole Use and Benefit of Lady Stroude; and if this does not import, that his Heir should not have them again, nothing can. And surely there's no Force in the Objection to say, that because it might have happened, that his Intent would not be able to be complied with so far as he designed, that therefore it shall not be complied with so far as it can. But in this Case in Fact it has happened, that it may be complied with in the Whole. And far from being unlikely was it, that his Intent would be able to be complied with in the Whole at first; for at the Time of the Devise Litton Litton had no Child; and Stroude Stroude was not married. But, he said, some Reliance might be made perhaps upon the general Words, which give all the Lands, Tenements and Hereditaments, which Litton had in Law or Equity, to Robinson; and here it might be objected, to what Purpose were all these Words put in, if nothing was meant to be given, but a *dy* Reversion expectant upon a Term of 1000 Years? He observed, that Robinson received ample Benefit by them; for he has thereby got an Estate in Possession in Hertfordshire of 2000l. per Annum; whereas this Estate is but 500l. Then as to the Attorney's second Objection the Solicitor said, that a Mortgagee's Interest is by no Means to be compared to the Limitation of a Trust Estate; for according to that Doctrine, if a Man's Estate was settled with several of these Remainders, he could not mortgage it, so as that the Remainder-Men could redeem it; for then the Mortgagee must be considered as possessed in Trust for the Mortgagee and the Remainder-Men; and there would be equally as strong an Objection against the Remainder-Men taking Advantage of their Trust, which the Attorney calls their Redemption, as there

there is against the Mortgagee's in the present Case having the residuary Interest to his own Benefit. Lord Chancellor and the two Judges declared their Opinions upon the first Point, that the Meaning of the Will was only to assign the Mortgages as a Security for the two respective Sums, which the Testator intended to give his Mother. They thought the Words mortgaged Leases had a Reference to the Money, which the Leases were charged to satisfy, as well as to the legal Interest in the Leases themselves. And farther observed, that the Words, pay off and discharge, might very well refer to the Discharge in the Hands of the first Mortgagees. They took Notice too, that the Assignments, being ordered to be made to the sole Use and Benefit of Lady Stroude, could not possibly be understood of being intirely and as to all Persons irredeemable; and therefore they thought the natural Meaning of those Words was, that the Terms should be assigned to her to raise the Money out of them, and that was a sufficient Benefit. The Chief Justice said too, that as this seemed to be the obvious Meaning of the Words, he thought it not immaterial, that in the last Clause of the Will to Robinson Litton, the Words were not all other my Lands, &c. (which, if the Devisor had intended to have given Lady Stroude the absolute Terms, in all Probability would have been) but all my Lands, &c. which seems to imply strongly, that he thought he had given none before. Accordingly the Court said, that as they were of this Opinion as to the first Point, there was no Occasion to say any Thing to the second. Salk. 156, 225, 229. 1 Mod. 54. 1 Vern. 462.

Ellis and Moon.

Vide 182.

Serjeant Belsfield came now to shew Cause, why the Judgment should not be arrested. He said, he did allow, that if the Plaintiff had set forth his Interest to have come to him per medias assignationes, the Issue would not have been good; but he thought, as the Words were, they might very well be understood, as the Defendant had taken them. At least, he said, he hoped the Issue could not be taken to be immaterial, but at the most imperfect, and therefore the Verdict would help it. But the Court said, that upon Consideration of the Words, they could not but understand them to be general, and therefore the Defendant did wrong in tying the Plaintiff up to one particular Sense of them. They said therefore they must take the Issue to be not material, and not only imperfect. Accordingly they awarded a Repleader.

Hatton and Walker.

Vide ante
213.

MR. Parker informed the Court, that he had now found the Case he mentioned upon the last Motion. The Name of it was Brownjon and Doiley, Hill. 8 Ann. which he said, if any Thing, was a stronger Case than this; for the Amendment was in a Point in Substance, by putting in the Word Sexcentesimo instead

stead of the Word Septingentesimo, where the Pear of our Lord, which the Abowry justified in, was mistaken; but besides this the Record was even made a Concilium. And accordingly he produced both Rules; one, for making it a Concilium; the other for amending it. So upon his producing the original Draught under Counsel's Hand, which was right, and an Affidavit likewise, that it had not been altered since it came from his Hand, the Court allowed the Amendment in the present Case.

Brown and Gilbert.

THIS was a Proceeding by Way of special Latitat; but the Plaintiff had added a new Count; and therefore the Court said, this was not within the Meaning of these new Rule. Accordingly would not tie the Defendant to plead within the four Days; but allowed him the ordinary Time. And the same they said they did in the late Case of Roberts and Mounford.

The Time which a Person shall be allowed to plead.

Anonymus.

MR. Strange moved to set aside an Execution upon an Affirmance in the Exchequer of a Judgment, that had formerly been in this Court. The Objection that he made was, that the Capias was void; because it recited, quod Recordum fuit nobis remissum; now he observed, that the Record itself of the Judgment in this Court never went into the Exchequer, and therefore it could not be said to be sent back. But Mr. Parker on the other Side said, that when the Transcript is sent back, it becomes a Record of this Court, and therefore it may be well said, that the Record was sent back; for that, which is now a Record, is sent back. Accordingly he said, that the Precedents in Thesaurus Brevium 42 and 51. were so. Upon which the Court allowed the Writ to be good. Salk. 261.

When a Judgment of the Court of King's Bench is affirmed in the Exchequer-Chamber, what shall be a good Writ of Execution of such Judgment.

Hilcock and Humphrys.

UPON a Reference to the Master of the Irregularity of the Countermand of a Notice of Trial, he reported, that the Countermand was within Time. And he said four Days is only allowed for it, when the Cause is in Middlesex, six when it is in London.

The Time for Countermanding a Notice of Trial.

Lewis and Lewis.

SErjeant Chapel came now to defend the Judgment below. He said, that there are two Points proper to be considered upon this Record; 1st, Whether a Civil Action would lie at all for this Offence at Common Law, admitting the Plaintiff received any particular Damage by it; 2^{dly}, Whether the Plaintiff had laid in his Declaration any particular Damage, that he did receive by it. He said, as to the first Point, that he thought the Authority of 2 Inst. 562. was fully with him; for it appears there upon the Recital of a Clause in the Statute of

Vide 120.

Articuli super Chartas, that there is a Remedy by Writ out of Chancery for such an Offence, and Lord Coke says, that such Clause in the Statute was affirmatory only of the Common Law. And in Fitzherbert's N. B. 172. a like Writ is for Champerty. He said too, that there were other Cases in the Law in Reason like this. In Marsh 81. and in Roll 100. In the last of which Places it is held, that if an Obligor raises the Name of an Obligor out of a Bond, and puts in another Person's Name, and this Bond is put in Suit against this other Person, an Action upon the Case will lie, as well as an Indictment of Forgery. So likewise in Fitzh. N. B. 95. it is held, that if a Man plays with false Dice and wins, an Action upon the Case will lie for this false Deceit; and yet unquestionably this is an Offence indictable. Then as to the second Point, he thought a particular Damage was expressly laid; for the Declaration first of all sets out, that the Defendant did imbrace Two of the Jury, and then concludes *ratione quarum quidem illicitarum & nequissimarum sollicitationum & imbrationum*, the Jury gave their Verdict for the Plaintiff. But Mr. Reeves on the other Side argued, that however strong the Authority of the 2 Inst. may be, it is certain all the Writs of Champerty and Imbracery conclude *contra formam Statuti*, and that is a very strong Argument, that these Writs would not lie otherwise. He said, he was far from contending, but there are many Instances, where a civil Remedy will lie as well as a criminal Prosecution; but he observed, that the Question was, whether a Statute giving a formed Remedy, in which no particular Damages are provided to be given, and all the Writs concluding against the Form of this Statute, was not an Argument, that there was no other Remedy by a Civil Action. Then to the second Point he said, that if any Remedy would lie for this Offence by Action at the Common Law, most certainly a particular Damage to the Party must be the Foundation of it. And therefore as a particular Damage is the Gist of the Action, such Damage ought to have been particularly and positively laid. Now the general Words *ratione quarum, &c.* are by no Means certain enough; no more, than if the Plaintiff had concluded, that the Defendant imbraced Two of the Jury *ad damnum, &c.* that would have been certain enough. He said, that it by no Means appeared but the Jury would have given the same Verdict, if there had been no Imbracery. And indeed the Presumption rather is, that the Verdict was according to Evidence, and that the Jury ought to have given the same. For otherwise the Plaintiff would have applied to have had the Verdict set aside. And the Imbracery itself would have been sufficient, whether the Verdict was agreeable to Evidence or not. Besides he said, as it appears upon the Record, there was barely a Verdict given, without any Judgment or Writ of Execution. For these Reasons the Court rather inclined to this Opinion upon both Points; but however upon Serjeant Chapel's Requesting it, they allowed it to stand over to be spoke to again.

Vide post

Cockerel and Brabant.

IN an Action of Trespass the Parties had entred into a Rule to try nothing but the mere Right, and that the Costs should abide the Event of the Trial. It happened that the Damages given were under 40s. but yet the Plaintiff moved now, that he might be allowed full Costs. The Court thought, that they had not sufficient Foundation to allow full Costs notwithstanding; so refused the Motion; and said, they must apply to the Judge to certify that the meer Right was tried.

How far it is necessary to apply to a Judge for his Certificate, in order to have full Costs, when the Damages are under 40s.

Edgeworth and Smallridge.

DR. Andrews came now to shew Cause, why a Prohibition should not go to the Dean of the Arches. He said, the Case was, That a Woman made her Will and left bona notabilia, and appointed the Plaintiff Executor of it. This Will was proved in the Prerogative Court of Canterbury. The Testatrix bequeathed a Legacy of 100 l. to one Durell, and he dying Intestate the Administration of his Effects was committed to the Defendant Smallridge; who accordingly libelled against the Plaintiff for this Legacy in the Court of the Dean of the Arches. The Plaintiff had suggested, that he was an Inhabitant in a foreign Diocese, not belonging to the Archbishop of Canterbury; he pleaded likewise the Statute of 23 H. 8. c. 9. and submitted it, whether he was obliged to answer the Defendant's Suit. And this Suggestion he made before Sentence. So that, the Dr. said, the Question proper for the Determination of this Court was, whether the Dean of the Arches was restrained from holding Plea in the present Suit within the Meaning of that Law. He observed, that by the ancient Canons, the Archbishop of Canterbury had a peculiar Authority of calling any Persons from whatever Parts of England he thought proper to answer all Ecclesiastical Matters that he should require of them. This Authority had been long before exercised by the Popes, and was derived from them to these Archbishops; and this was called their legatine Jurisdiction. The Design of the present Act was to take this Authority from them; but yet it has still allowed them the Exercise of this other Authority, which relates to the Probate of Testaments, for that is common with the Archbishop of York; and this Clause of the Statute has received a liberal, but true Construction; for the Judges have allowed the Archbishop the Right of Administration likewise. The Doctor took Notice, that the Prerogative Court was such, as its Authority was confined merely to the Probate of Testaments and granting of Administration; the Court of the Dean of the Arches was that, where the subject Matter of those Wills was determined; and therefore, he said, the same Statute which allows the Archbishop the Probate of these Testaments, which can only be in the Prerogative Court, must necessarily be understood to allow him the Continuance of his Jurisdiction in Causes belonging to them, which can only be in the Court of the Dean of the Arches. He observed, that the

Construction upon the Statute of 23 H. 8. c. 9. relating to Citations.

Common

Common Lawyers had sometimes confounded in their Reports the Jurisdiction of these two Courts. And particularly 1 Cro. 97. in the Case of Smith and The Executors of Poyndreill, where a Suit upon a Will was said to be in the Prerogative Court; whereas the Doctor said, he had ordered Search to be made for that Case, and it was in the Court of the Dean of the Arches. He then observed, that as there was just Foundation for this Construction upon the Act, there was likewise established Authority for it in the Books. 1 Ven. 233. is in Point. And many other Instances are to be met with in the Books of Common Law, where they have allowed this Court to proceed in Cases more extraordinary than this, where they have been once lawfully possessed of the Cause. As Heiley 47. 1 Cro. 483. 2 Rolls 18. 1 Cro. 339. Accordingly he prayed, that the Rule might be discharged. Mr. Reeves on the other Side argued, that they were upon the Words of a Statute; and he thought there was no Foundation for this Power from the Exception in it which the Dr. relied upon, for merely that beneficial Authority of proving Wills seems to be reserved by the Exception, and not that Judicial one of deciding Causes upon it. Chancery, he said, might properly have that Jurisdiction. And accordingly, he said, this Point was determined in Godbolt 214. where a Prohibition was granted in a like Case. In Coke's Ent. 448. there is likewise a Precedent of a Prohibition in this very Case. He said, that he did allow a Motion of this Nature could not be made but before Sentence; and in this a Prohibition upon the Statute differs from all other Prohibitions to the Ecclesiastical Courts; but he said, that they had made their Application before Sentence; and therefore this could not be objected to them. The Court said, that as to the last Thing mentioned by Mr. Reeves of this Motion's being requisite to be made upon this Statute before Sentence, he was certainly right. Lord Chief Justice Holt declared, that no Person should have Relief upon this Statute but by making his Application in the Time mentioned; and so the Law has constantly been held since. But however as to the Point in Question the Court was of Opinion, that no Prohibition ought to go; for the Executor by proving the Will has admitted the Jurisdiction, and therefore shall not be suffered afterwards to come and disallow it. Judge Reynolds said, that he was of Opinion, that the Prerogative Court was only derived out of that of the Dean of the Arches for this particular Purpose of proving Wills; and accordingly the Court discharged their Rule.

Anonymus.

ONE Kimberley had been committed by Sir William Billers, a Justice of Peace, for marrying an Heiress in Ireland against her Consent, which Offence is made Felony without Benefit of Clergy by a Statute made in Ireland the 6th of the late Queen. And the Commitment ordered the Keeper of the Poultry Compter to detain him, till there should be proper Means found out to convey him to Ireland to be tried. Mr. Fazackerly and Mr. Strange moved now, that he might be discharged. They said, they did not see, that it could ever be justifiable at Common Law to send Persons out of the Kingdom for Offences supposed to be committed in other Parts of the King's Dominions. For by the same Reason as it might have been done for a Capital Offence, it might have been done for any other Misdemeanor. And they said, it would have been a Thing of a most extraordinary Nature, that a Man might have been carried by Force out of this Kingdom to answer for a Battery abroad. They said, they did not know any Process there was by Law to convey a Man over; and if that was so, it would be a very difficult Thing to shew the Legality of it. Mr. Reeves on the other Side said, that perhaps it might require sometime to consider the proper Means by which the Party might be sent over in the present Case. He said, one of the Secretaries of State had been applied to, to grant his Warrant to a Messenger for that Purpose; and he had ordered, that the Attorney General should be attended by Counsel to see what could be done. But he observed, that it was a constant Practice before the Habeas Corpus Act to do it; that Act by no Means declares it to have been illegal, which is an Argument that it was not so; or else the Legislature would have done it, it is probable, when they ordered it should be practised no longer for the future in common Misdemeanours. And in Offences of a Capital Nature, there is an express Provision in the Statute, which allows it to be continued. The Court said, the Practice was certainly legal. In Colonel Lundy's Case, 2 Vent. 314. all the Judges were expressly of this Opinion, except three who were not present. And Serjeant Corbet mentioned a stronger Case than this in 3 Keb. 785. where a Man was sent even to Portugal for a Murder, charged to have been by him committed there. However the Court said it might be proper to be considered what might be the Method of sending the Prisoner over. But they observed one Thing in Favour of him, that they would never suffer him to lie long in Custody here, after a convenient Time for finding out the Means for sending him over. However they said, they thought at present the Justice of Peace had done but his Duty in making the Commitment in the Manner that he did. They said, he was properly a Conservator of the Peace; and it was no Objection to say, that the Offence was committed abroad, and therefore out of his Jurisdiction. For they said, if a Man is charged with a Felony supposed to have been committed in Yorkshire, the Justice of Peace in London

When an Offence is committed in Ireland, and the Person who committed it comes over into England, what Method may be taken to convey him into Ireland in Order that he may be punished there for it.

may certainly commit him to the County Gaol, which he has Authority over, and from thence the Party must be sent to the Prison of the proper County, to receive his Trial. And they said, the Defect of Jurisdiction over the Offence itself is equally the same in both Cases. So for these Reasons the Court thought proper to remand the Prisoner. But Mr. Strange then said, that he believed they should have Occasion in a few Days to lay before the Court some Affidavits upon the Circumstances of the Case to induce the Court to bail him; and therefore he prayed, that the Prisoner might be brought up again by Rule, without the Charge of a Habeas Corpus. But the Court said, that at present there had been no Fruit of their Habeas Corpus; and therefore as yet it was not regular to move, that the Prisoner might be brought up by Rule. *2 Skin. 163.* Afterwards he was sent over by Order from one of the Secretaries of State.

Anonymus.

What shall
not be said to
be a good spe-
cial Latitat.

MR. Strange moved to set aside a Judgment in an Action of Trespass, where the Proceedings had been upon the new Rule. But he observed, that the Writ of Latitat was only de transgressionibus & insultu; but the Declaration was de transgressionibus, insultu, & verberationibus; upon which, he said, that the whole Cause of Action was not set forth in the Writ; for there may be a Trespass and Assault without a Battery. Mr. Taylor was of the other Side. But yet the Court set aside the Judgment. And, they said, if in Debt the Plaintiff's Bill should charge the Defendant with centum libris, quas ei debet & injuste detinet, that would not be enough, without setting forth a Bond, Arbitrament, or other special Cause in a general Manner, which the Debt grew due upon. The Master informed the Court, that that Way of setting forth the Cause of Action with a quas ei, &c. would be good in the Common Pleas; but the Court notwithstanding said, that was not within the Meaning of their Rule. Accordingly the Court set aside the Interlocutory Judgment, and told the Defendant's Counsel, that without Motion they had a Right to an Imparllance of Course.

The King and The Inhabitants of Risley.

How far an
Order of one
Justice of
Peace cannot
be made in-
consistent
with an Or-
der of ano-
ther Justice.

Vide post.

A Man and his Family had been removed from the Parish of Dean to the Parish of Great Staunton, and afterwards without Appeal another Order was made, reciting that they were not settled in the Parish of Great Staunton, and therefore removed them to the Parish of Risley. Upon which, Mr. Lee moved, that this second Order might be quashed; and the Court accordingly made a Rule to shew Cause.

The

The King *and* The Churchwardens of the Parish of Wilkinton.

MR. Fazackerly moved as a Motion of Course for a Mandamus to be directed to the Churchwardens to make an equal Rate. But the Court said, they always expected an Affidavit in these Cases, which Mr. Fazackerly accordingly produced. But the Contents of it only were, that there had been an unequal Rate, and that Rate was quashed. The Court said, it does not appear, but the new Rate, that they will make, may be equal. Mr. Fazackerly said, that the Reason for his making his Motion in the Manner he did was not really upon a Complaint that the Churchwardens would make an unequal Rate. A Rate only he wanted. But he said, he chose to Word his Motion in the Manner he did; because he believed the Rule must be drawn up so. And if it was drawn up only for a Rate in general; the other Side, when they should come to shew Cause, might object, that it was not made in Pursuance of the Words of the Statute. The Court said, that might be necessary; accordingly the Rule was ordered to be drawn up in that Manner for an equal Rate.

How far the Court will grant a Mandamus to require Persons to make an equal Rate for the Relief of the Poor.

Anonymus.

MR. Fortescue moved for a Mandamus to be directed to the Mayor and Capital Burgeses of a particular Borough to go to the Election of one of the Capital Burgeses; and he said, as the Circumstances of the Case were, he hoped the Court would grant a Peremptory one directly; and accordingly, he said, they had served the Mayor with Notice, that they should move in this Manner. The Counsel of the other Side said, that this Motion was contrary to the Practice of the Court; and he said, it was so far so, that the Court does not so much as grant a common Mandamus in Cases of this Sort without making first of all a Rule to shew Cause. The Court said, that the Counsel had each of them carried their Notions of their own side too far. For they said, in the first Place it was clear, that a Mandamus could not go at all in such Cases as these without an Affidavit to shew the Occasion for it. But then, they said, they grant it directly. However in no Case they grant a peremptory one first.

How far the Court does not grant a peremptory Mandamus.

The King *and* The Inhabitants of Holiborn.

MR. Richardson came now to shew Cause, why the Order should not be quashed. He said, the other Side had founded their Motion upon two Cases in Point for them. One, that of St. John's Harford and the Parish of Ampwell, Mich. 8 Ann. the other, that of Southsidnam and the Parish of Lammerton. He said, that the last cited Case happened first in Time. But he observed, that there was another Circumstance in that Case, and that was, that the Party removed claimed

Vide anno 174.

claimed an Interest in the Lands as Administrator, but had not taken out Administration; and the Question there was, whether this Interest, which he was in Possession of, was sufficient to gain the Party a Settlement. He said, that the Court entered fully into that Question, and determined, that the want of taking out the Letters of Administration made no Difference. He did allow, that the present Point is likewise reported to have been determined at the same Time. But he said, as there was another Point for the Court to found their Resolution upon, he submitted it, that this was not so great an Authority. He then observed, that the Case of the Parish of Ampwell was founded upon this. And therefore, if this is not of great Authority, that cannot neither. He said too, that he ordered the Rule to be searched for in that Case; and he could not find, that ever the Rule for shewing Cause was made absolute. He then observed that the Words of the Statute of 13 & 14 Car. 2. 12. were fully of his Side; for they provide, that every Person shall be removable from any Parish, who does not Rent a Tenement there of ten Pounds per Ann. But Mr. Marsh said, that he was of Counsel in the Case of the Parish of Ampwell in Lord Parker's Time, and it was settled upon Debate. Judge Reynolds said too, that he thought the Objection thrown upon the Case of the Parish of Lammerton was of no Weight; for he said, the Court could not have adjudged the Settlement there to have been where they did, but by determining the present Point as well as the other. Accordingly the Court was of Opinion, that the Order in the present Case should be quashed. And Judge Probin said, that where Lands, belonging to a Farm, lie in different Parishes, that Parish is to be charged with him where the House is, which belongs to the Farm, and which he inhabits in.

Hetherington and Lowther.

Vid. ante
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MR. Reeves had obtained a Rule a few Days ago for shewing Cause, why a Plea of Privilege against Privilege should not be set aside as frivolous. Mr. Strange came now to shew Cause, and said, that the Plaintiff had sued by Original, instead of Bill, and thereby had waived his Privilege, and therefore the Plea of the Defendant was really good. But besides he observed, that he himself had made the same Motion last Term in the very Case Mr. Reeves now did, and the Court refused it. The Court said, that they thought both the Reasons were equally good for discharging the Rule; and accordingly did so.

The King and Tayler.

Serjeant Girdler moved to quash an Indictment, which charged the Defendant with being calumniatrix & communis pacis Perturbatrix. He said, he supposed this was intended to be an Indictment for a Scold; but he observed that Rixatrix was the technical Word for that Purpose. He said, the Case of The Queen and Saxbey, Mich. 6 Ann. was stronger than this. The Indictment there charged the Defendant with being communis Rixa pugnatrix. Serjeant Parker said there, that the Meaning of that charge was, that the Defendant was a common Fighter in her Scolding. But notwithstanding that Indictment was quashed. Mr. Moreton on the other Side argued, that there are many Cases, where a fixed Certainty in Expression seems equally necessary as in the present Case, and yet the Law will allow the Sense to be conveyed by various Expressions, so that they be equally significant to convey the Meaning. He observed, that the Statute of Forcible Entry requires, that the Party shall be actually expelled from his Freehold before he shall be within the Relief of that Law. The Meaning of which Expression naturally imports, that the Party shall by Force be first personally removed from it. Yet it has been held, that disseisverunt is as good in an Indictment upon that Statute, as expulerunt. But certainly a Disseisin may be where a Person is off the Possession, an Expulsion, only where he is actually upon it. But the Court said, Rixatrix has been always held to be a Technical Word; they said too, that they did not think, the Meaning of the present Indictment was to express a Scold, but one that sows Slander and makes Disturbances; and then it is bad, for being too general; so accordingly quashed it.

How far the Court will quash an Indictment for Slander.

Marwood and Dorrell.

FOUR Sisters had signed a joint Letter of Attorney to empower one Edmunds to bring an Ejectment and to appear for them. The Ejectment was accordingly brought upon two Demises, one of all the Sisters jointly, the other of two of them only. Upon this the Parties went to Trial, and a special Verdict was found. The Title upon the joint Demise and the Title upon the separate Demise was found exactly to be the same. And now the two Sisters, who were not concerned in the separate Demise, since signed an Instrument, purporting a Countermand; and thereby ordered their Attorney Edmunds to proceed no farther for them. Upon which Mr. Lee and Mr. Ward moved, that a Rule might be made upon him to shew Cause, why he proceeds any farther against the Directions of his Clients. They said it was a joint Action, that the Plaintiffs were concerned in, and if one has a Mind to proceed no farther, the other cannot neither. They thought that there being a special Verdict in this Case could make no Difference; for it is common for Plaintiffs to non-pross themselves, or discontinue after it. Therefore if the other two Sisters should

When a Joint Ejectment is brought, how far one of the Plaintiffs has it in his Power to put a stop to it.

How far the Court will not enlarge the Term in an Ejectment.

think proper, they must bring a new Ejectment. The Court said, they thought it a little hard, that one Plaintiff should prejudice another in this Manner. And therefore Judge Reynolds told the Counsel, that if they thought a Countermand of this Sort would stop the Suit, they must plead it after the latter Continuance. But the Court thought to do nothing in it; however ordered a Rule to be made to shew Cause. Mr. Reeves then said, that he was Counsel of the other Side, and he hoped the Court would do nothing in this Matter. He said, the special Verdict was settled, and actually made a Conciliam. And the Court now must judge upon the whole Record; the Verdict cannot be altered as to these two Sisters, and stand good as to the Rest, though the Title upon both Demises is the same. And he thought it a most extraordinary Thing, that one of the Parties should have a Power after this Length of Proceeding to render fruitless all that has been done hitherto, by such a Manner as revoking the Letter of Attorney. But he observed farther, that the Countermand itself has been procured from these two Sisters in a most extraordinary Manner. These two are professed Nuns abroad; this Ejectment has been founded upon a Statute in 11 & 12 Wil. against Papists; the original Letter of Attorney was freely and openly signed by them; a Priest has gone over from England, and told them that a Proceeding upon this Statute will be of terrible Consequence to the Roman Catholics here; and these two Sisters were actually threatened by the Lady Abbess with being excommunicated if they did not sign the Countermand. He said that under these Apprehensions it was signed. And yet this Instrument is to set aside all the Proceedings. Mr. Lee then said, he believed it would not be necessary to pray, that the Proceedings may be said as to the other Sisters; he said therefore that he desired, that that Part only of the special Verdict might be erased, which related to the two Sisters he moved in Behalf of. He said, this Proceeding is in a feigned Suit, and therefore the Court might do it; and especially, because the Chief Justice tried the Cause, and therefore knows, that the Title upon both Demises is the very same; so that the other Sisters can suffer no prejudice. He said, Terms have been enlarged by the Court in these Ejectments, where otherwise they would run out. And therefore he hoped this Motion was but reasonable. Then as to the Manner of the Countermand's being got, he said, it was witnessed by a Person of Credit and Character now present; and therefore he hoped upon this Motion the Court would not enter into that. Mr. Ward said, that, as to what Judge Reynolds was pleased to mention of pleading this Matter after the latter Continuance, he was afraid, it could not be done; because the Countermand is only by the two Lessors of the Plaintiff, and not by the Plaintiff himself. The Court said, that considering the Circumstances in which the Countermand was obtained, it was clear, they ought to do nothing in it. But even if the Countermand had been obtained freely, they should have thought the same. They said they could not see they had Authority to alter the Verdict in any Respect. And

Judge

Judge Reynolds said, that Terms may have been enlarged by the Court formerly; but the Rule now is, not to do it but by Consent. So the Motion was denied. Salk. 257.

Fortescue Aland and Mason.

THE Plaintiff had set forth in his Writ of Error in the King's Bench in Ireland, that Henry Aland was seised of the Lands in Question in Fee, and settled them upon Jonathan Aland in Tail Male, Remainder to the Plaintiff for Life, with several Remainders over. That Jonathan conveyed them to Dorryll and another; and that a Common Recovery was suffered, and Jonathan came in as Clouchee; that Jonathan died without Issue, that there were Errors in this Recovery, and therefore he brought his Writ to reverse it. The Defendant pleads there, that Jonathan Aland was seised in Fee, that the Lands descended from him to his Daughter Anne, and from her they came to the Defendant, as her Son and Heir. He farther pleads, that he is within Age, and therefore prays, that the Parol may demur. Upon this Plea there is a general Demurrer. And the Court of King's Bench in Ireland allowed the Plea to be good. Serjeant Hawkins argued for the Plaintiff, and said that he certainly must admit, that there are many Instances, where the Parol shall demur in the Case of Infants; but he said that there were particular Instances too, where it shall not. In the Case of Attaint against Jurors, Writ of Detest against Summoners, Quare Impedit, Writ of Dower, in none of these it shall. And he said, the general Reason of these Cases seems to be, that if the Parol should demur, the Party perhaps might not have the Benefit of his Suit. And that Reason, he said, held in the present Case, for the Plaintiff is only Tenant for Life; and it is by no Means unreasonable to fear, that if the Plea should demur for twenty Years, the Plaintiff would lose his Right. And it by no means appears in the present Case, how young the Infant may be. That too is another Reason, why the Plea is not good; the Certainty of his Age ought to have been fixed, in order that a Writ of Resummons may go, when he shall come to his proper Age for answering. He observed likewise, that the Infant ought to have shewn himself to have been Tenant of the Land; for otherwise it does not appear, that he can be any ways prejudiced. He took Notice, that there was another Defect in the Defendant's Plea, in not shewing a Title to the Seisin in Fee of Jonathan. He allowed that in general a Title need not be shewn to such an Estate; but wherever a Plaintiff sets forth, that such a one was seised of a particular Estate only, and the Defendant pleads, that he was seised in Fee, he must either traverse the Seisin of the particular Estate, or else, if he admits it, must shew how the particular Estate came to be destroyed, and so make a Title to himself. He said, the other Side might object perhaps, that the Plaintiff had done this himself by allowing the Common Recovery; but he observed, that that could not help the Defendant, for Jonathan came in as Clouchee,

Vide ante
100.

Clouchee, and then these Uses of the Recovery of Course go to the Tenant of the Præcipe, if there was no Deed declaring the Uses to the contrary. He said too, that this Plea of the Defendant's comes in after an Imparlanee; and therefore it was bad upon that Account, for it is a mere Dilatory. Mr. Bootle on the other Side argued, that no Rule of Law was more universally true, than that where the Interest of an Infant, who is in by Descent, may be perpetually barred in any Action, he shall have his Plea of Infancy allowed, 9 Rep. 85. is expressly to that Purpose. And in the present Case he certainly may be so, for his whole Right depends upon the Common Recovery; and if that be reversed upon the Writ of Error, he is without Relief. He then said, the Plea of Infancy is pleaded, as the best of Precedents are, Rast. 26, 360, 362, is so. He allowed, that some few Instances were to be given of the Age being fixed in Certainty under a Scilicet; but that could be of no Significance; for a Scilicet is never traversable, neither can it conclude the Party; and if a Resummons should be taken out at the Time he ought to come of Age, according as he has ascertained it by the Scilicet, he may vary from the Time, and plead it is not come yet. He then observed, that he has expressly shewn himself to be Tenant; for he has conveyed to himself a direct Descent of the Fee from Jonathan. He took Notice likewise, that a Title was made to him under the Recovery; for nothing is more frequent, than for a Tenant in Tail to make a mere indifferent Person Tenant to the Præcipe; and it would be a very strange Thing, that he should have the Benefit of the Uses of the Recovery, rather than the Tenant in Tail himself, where there is an Omission of a Deed to declare the Uses. And to the last Objection he said, the Plaintiff should have applied to the King's Bench in Ireland, that they would not receive the Plea, or else should have demurred specially to it. The Court said that they would not give their Opinions at present; but said, if the Plea was rightly pleaded, they did not see but it was good. Judge Reynolds said, the only Instance of its not being allowed in a Writ of Dower, is where the Writ is Unde nihil habet. But they doubted, whether the Plea was rightly pleaded; for the Infant must shew he has an Interest to lose; and they did not see the Recovery could be taken to be to Jonathan's Use, as the Plaintiff has set it forth; for he says expressly, that Jonathan conveyed the Lands to two others. But they said, they thought there was still a greater Objection, in that there was no Tenant to the Præcipe at all; and therefore as it stands upon the Pleadings, the Plaintiff must have Title. However it stood over. 2 Cro. 392. 1 Ven. 358.

Vide post

Evan Price, Clerk, Chaplain of the Chapel of Bovington,
Plaintiff, Isaac Prat and others, Parishioners of the
 Parish-Church of Hemel-Hempsted in Hertfordshire,
Defendants.

SECC. **T**HE Plaintiff set forth in his Bill, that the Chapel of Bovington is Parcel of the Vicarage of Hemel-Hempsted, that the Vicars for the Time being have always nominated the Chaplain; but that he being once nominated is in for Life, and not removable. The Bill farther set forth, that the small Tithes of this Chapelry have always been paid to the Chaplain for the Time being. The Plaintiff farther sets out, that one Cornelius Price was Vicar of the Parish aforesaid, and by Deed appointed the Plaintiff Chaplain of the said Chapelry. Accordingly he took a Licence from the Bishop of the Diocese; and then Cornelius died; and Topping was made Vicar in his Room. The Plaintiff farther set forth, that upon the Solicitation of Topping, he took a new Appointment from him; and the Bishop being translated, took a new Licence from him too. And upon this he preferred his Bill against the Parishioners to have an Account of the small Tithes for several Years past. The Defendants set forth in their Answer, that the Chaplains for the Time being are removable at Will; that Topping did accordingly remove the Plaintiff; and that the Demand of an Account for Tithes is only for Tithes supposed to be due since the Removal. The Cause was now set down for a Hearing. But the Court said, that Topping ought to have been made Party to the Suit, and therefore they could do nothing in it without him. The Chief Baron observed too, that by the Common Law all Curates are removable at Pleasure; by the Ecclesiastical Law they are for Life. And he and Mr. Baron Carter agreed, that a Curate cannot prescribe for small Tithes. The Chief Baron observed too, that every Curate must take a Licence, unless Fellows of Colleges, &c. And Mr. Baron Carter said, that no Curate is obliged to take a new Licence upon a bare Translation of a Bishop; and that though this is frequently done, it has been complained of in Parliament.

How far Curates are obliged to take a Licence.

Beetknife and Sir Herbert Packington.

THE Plaintiff had brought an Action against the Defendant for work done as a Coach-maker. Upon Judgment being by Default, Notice was given, that the Writ of Inquiry would be executed between the Hours of ten and eleven. The Defendant came to attend the Execution of it by Counsel within nine Minutes after ten, and then he was told the Execution was over. Upon which Mr. Wills moved, that the Judgment might be set aside. But the Court said, that the Defendant ought to have attended precisely at ten; and that therefore they could do nothing in it. But then Mr. Wills said, that here were

The Notice to be given on executing a Writ of Inquiry.

O o o

ten

Vide post

ten Counts in the Declaration; and therefore the Plaintiff must have begun before ten, to have ended so soon. And upon that the Court made a Rule to New Cause.

Hitlock and Umphrys.

What relates
to Counter-
mand of No-
tice of Trial.

THIS was a Cause set down for Trial in Middlesex. The Plaintiff had countermanded the Notice of Trial four Days before it was to be. But the Defendant had feed Counsel; and therefore Mr. Tudor moved a few Days ago for Costs. Mr. Clark informed the Court, that the Practice was to allow them. But the Court said, the Countermand was in Time; and they were sure the Court of Common Pleas never allowed them in such Cases. Mr. Masterman said too, that in the Crown-Side the Countermand is only two Days before the Trial in Town Causes, four Days in Country ones; that is, where the Countermand is in such Case given in Town; but if the Countermand is given in the Country, there are but two Days neither. And he said, where the Countermand is thus regularly given, they never allow Costs. The Court upon this said, they would consider of this Matter a little longer. And now Mr. Tudor moving it again, they said they were of Opinion he could have no Costs, and made a Rule for the Future, that a Countermand of the Civil Side shall be just the same as it is of the Crown Side.

The King and Fisher.

What shall
be said to be
such a Trade
as is within
the Statute
of 5 Eliz.

THIS was an Indictment against the Defendant for exercising the Trade of a Sail-maker, without having served a legal Apprenticeship. Serjeant Eyre moved in Arrest of Judgment, that the Business of making Sails is such as every Seaman knows, and therefore it was not within the Meaning of the Statute. He then said, that the Indictment charges the Defendant with having exercised this Trade for two and twenty Months, and the Verdict finds, that the Defendant used it pro duobus primis mensibus tantum. Now he observed, that it appears by this, that the Offence was committed above a Twelvemonth before the Indictment brought; and therefore the Indictment was brought too late. For the Offence was committed within a Corporation, and thereby the Corporation has a Right to the Penalty. But he observed, that though the King is not confined to bring his Information or prefer his Indictment within the Year; but if he brings it after, he will have a Right to have that Share of the Penalty, which belongs to him; yet he observed, that a Corporation cannot have the Benefit of the Penalty, if the Indictment is not preferred within the Year, no more than the Prosecutor himself. Besides he took Notice, that the Verdict was informal in convicting the Defendant as to the two Months, but not precisely acquitting him as to the Rest of the Time. Accordingly upon these Exceptions the Court ordered the Judgment to stay, till the other Side should move this Matter again. Salk. 611.

Bidwell and Lethbridge.

THE Plaintiff brings an Action of Covenant, and declares upon a Deed, wherein one Ham and the Defendant had covenanted to do certain Acts to the Plaintiff; and farther sets forth certain Acts, that he had covenanted to do to them. And in the End of the Declaration concludes, quod profert in Cur' factum prædict', cujus quidem altera pars sigillo ipsius Lethbridge fuit sigillat'. The Defendant had pleaded to this a Ham Plea, and upon a Summons being taken out before a Judge, the Judge ordered the Plea to be set aside, and that the Defendant should plead an issuable Plea. Upon this the Defendant pleaded, quod prædictus Ham & Lethbridge non sigillarunt factum prædict'. And upon that the Plaintiff signed his Judgment. Upon the Master's Report the whole of this Matter came before the Court. And now Serjeant Belfield argued, that the Judgment was irregularly signed. He observed, that the Plaintiff had declared upon a joint Deed, and by that Means gave the Defendant a Liberty to traverse the Signing of this Deed by one of the Parties. For he said, that it was an established Rule, that every Deed must be pleaded according to the legal Effect of it, and not according to the Words it is formed in. For this Reason, he said, he hoped the Plea of the Defendant was strictly right; but if it was so bad, as that the Fault in it might have been taken Advantage of upon a Demurrer, he thought there was no Foundation for the Plaintiff to sign his Judgment, as if it was no Plea at all. But Mr. Draper on the other Side argued, that the Plaintiff could not have declared in any other Way than he did; the Words of the Deed were joint, and if the Plaintiff had declared upon a Deed made by Lethbridge only, it would have been bad. But he said, the Plaintiff had taken the true Method; he had declared upon a Deed, joint in Words, but such as in fact was only single; the Deed being signed by one of the Parties only. And this, he said, was declaring according to the legal Effect of it. And he observed, that 2 Roll. 22. was in Point, and quoted likewise the Case in 5 Rep. 23. Then as to the second Objection, he said, the Fact stated by the Master gave an Answer to it. The Judge ordered an issuable Plea to be given; the present Plea is as no Plea, because it is of a Matter by no Means material; and therefore not at all according to the Design of the Judge; and consequently the Plaintiff might sign his Judgment for want of one. The Court accordingly said, that these Answers to the Objections were sufficient; and therefore thought the Judgment was regular.

How far a Deed must be pleaded according to the Operation of the Law.

The

The King and Greenhill.

How far a
Certiorari
shall remove
an Indict-
ment rela-
ting to the
Highways.

MR. Theede moved for a Certiorari to Hicks's Hall to remove an Indictment for not working in the Highways. The Court seemed at first to think, that the late Statute had taken away Certioraris in general for removing Indictments concerning the Highways. But Mr. Theede said, that those Statutes had indeed declared, that no Certiorari should go upon Indictments founded on those Statutes for not repairing the Highways, but he observed, that the present Indictment was founded upon the Statute of 2 & 3 Phil. & Mar. and those Statutes have no Retrospect to former Laws. Accordingly, he said, Certioraris have before gon in the Case of The King and Coleman, Pasch. 12 Geo. 1. and in the Case of The King and Echard, Mich. 12 Geo. 1. And upon this the Court granted the Certiorari in the present Case.

The Attorney General, at the Relation of several Members of the Corporation of Liverpool, against Others of the said Corporation.

How far a
Court of E-
quity has a
Right to
make a Per-
son account
before them
notwith-
standing
there's ano-
ther Method
appointed
for the pas-
sing such
Account.

Scacc. **A**N Information had been filed by the Attorney General against the Defendants to call them to an Account for a Misapplication of the Revenue of the Corporation of Liverpool. At the Time the Defendants had obtained a Dedimus to take their Answer in the Country, the Relators had set forth to the Court, how that the governing Part of this Corporation had made an Order, that all Suits carried on or intended to be carried on relating to the Corporation should be supported at the publick Charge and Expence of the Body. They produced Affidavits at that Time, that the governing Part of the Corporation were concerned in no Suits at the Time they made this Order, nor were they likely to be concerned in any; and that the Corporation therefore designed plainly by this Order, that the Defendants should be supported by the publick Charge in the defending themselves against the present Inquiry. The publick Money was in the Hands of the Defendants; but the governing Part of the Corporation were said at that Time to have been concerned in this wasting of the Revenue equally with the Defendants themselves. And therefore upon Debate the Court had granted an Injunction against the Defendants, to prevent the laying out any remaining Part of the Revenue, but for the common Advantage of the Body. The Defendants set forth in their Answer, that from the Time of the Corporation's making this Order no one Part of the Revenue had been disposed of, but in a due and proper Manner; that it was an Order made to protect the Corporation against Suits, which the publick Body might be threatened with; and therefore their Counsel applied now, that the Injunction might be dissolved. They said, they thought it a general Rule, that the Court never grants an Injunction to stay Waste, but upon an Affidavit of Waste's

Waste's being actually committed. They submitted it, that there was equal Reason in the present Case, that the Injunction should not have gon at all; but at least that now the Injunction should be dissolved, since the Defendants have sworn by their Answer, that no Abuse has been made of the Order. But they said, they had something to lay before the Court, to shew that the Information itself was absolutely improper. A late Act of Parliament has passed, which appoints particular Justices of Peace to audit the Accounts of this Corporation; accordingly these Defendants have actually made up their Accounts before them frequently before the Filing of this Information; and therefore they submitted it, that the King's Attorney General had no Authority to proceed against them in this Manner. But the Chief Baron said, that the Order in the present Case did not barely provide, that all Suits should be defended out of the publick Treasure, which concerned the Body of the Corporation in general, but was drawn up in a much more extensive Manner, that all Suits should be defended at the publick Expence, which any Ways concerned the Corporation. He said therefore, that according to this Order every Election of a particular Member is to be supported out of the common Stock; whereas by the Law of England every Member is to maintain his own Election at the Expence of his private Fortune. He observed therefore, that this was an Order directly tending to the Consumption of the Revenue, and therefore it was proper for the King's Supreme Courts to interpose and prevent it. He said the King's Bench had done the same in a Cause of Two, which he had been formerly concerned in as Counsel. The Court there by Accident happened to take Notice, that a By-Law stated upon Affidavits was illegal; and upon Motion they made a Rule, that it should not be put in Execution. In the Case of the Devises too Complaint was made, that pending a Cause relating to that Town, continual Disturbances were committed; and the Court upon that granted a Rule, that the Peace of the Corporation should be kept. Then to the second Observation made, he observed, that if the Counsel had thought, that the Stating of this Account before the Justices authorised by the Act would hinder this Court from looking into the Irregularity of it, they ought to have pleaded this Matter in Bar; but it was a Rule, that the Court would never enter into a Matter of this Sort upon a Motion. He said the only Method now was to take Advantage of it upon the Hearing of the Cause. But to speak his Thoughts at present, he believed this Matter could never be material to them to prevent a Prosecution of this Nature. Indeed if the Corporation had called the Defendants to an Account, undoubtedly this Bar would be good. But he thought the Intent of the Act could never be to take from the King this extraordinary Act of Jurisdiction. Baron Carter declared, that he was of the same Opinion in both Points with the Chief Baron; and accordingly, there being no other Judge in Court, they ordered the Injunction to stay.

How far an Order made by a Corporation shall be said to be illegal.

How far the
Court may
decree Re-
stitution a-
gainst Rela-
tors.

N. B. The Chief Baron said, that if the Relators should be found to have been concerned in this Misapplication, they should make no scruple of decreeing Restitution against them as well as the Defendants; as they frequently order Plaintiff and Defendant both to be examined upon Interrogatories.

Law and Davis and others.

What Words
in a Will
create an E-
state-tail
what for Life
only.

IN an Assize for several Parcels of Lands the Jury finds a special Verdict, That Daniel Jevin was seised of the Lands in Question in Fee, and had three Sons, Thomas, Richard and Benjamin; they find that he made his Will, and there-by reciting, that he had provided for his two elder Sons in his Life-time, devised the Lands in Question in Manner following. As to one Parcel thereof, to Anne his Wife for Life, and after her Decease to Benjamin and his Heirs lawfully begotten, that is to say, to his first, second, third and every other Son, and the Heirs of their Bodies successively, the first in Priority of Birth and Seniority of Age always to be preferred before the younger; and in Default of such Issue, he reserved the Remainder to his own right Heirs for ever. He then devised another Parcel of them to Anne his Wife for Life, the Remainder to Benjamin and the Heirs of his Body, viz. to the first, second, and every other Son in Manner and Form as aforesaid, reserving the Reversion to his own right Heirs. And in the same Manner of Expression he devised five other Parcels of his Lands by distinct Clauses in his Will. The Jury farther find, that Thomas, Richard and Benjamin died without Issue Male, and that only Richard left one Daughter, who married Fowler, and that they were Lessors to the Plaintiff. They find likewise, that Anne died, and that afterwards Benjamin suffered distinct Recoveries of these several Parcels of Lands to Persons under whom the Defendants claim severally as Lessees. The Question upon this Verdict singly was, whether Benjamin had a Remainder in Tail devised to him, or barely an Interest for Life. Mr. Wills was Counsel for the Plaintiff, and began to argue, that Benjamin had a bare Estate for Life. But the Court told him, that for the present they were pretty clearly of the same Opinion, and therefore ordered the Counsel of the other Side to proceed. Mr. Wilbraham then said, that he believed it would be admitted to him, that if the Words had concluded before the viz. the Estate given would have been manifestly an Estate in Tail; and when the Words were so express, he thought it would be a very difficult Thing for other Words to destroy the Sense of them, whose only Business is to explain and correct the doubtful Meaning of them. To this purpose he applied Hob. 171. and Cro. Eliz. 248. But the Case he principally relied on was in 2 Ver. 451. A Man devised there the Residue of his personal Estate to be laid out in Lands, and that they should be settled to William Legate for Life, and after his Decease to the Heirs Male of the Body of the said William, and the Heirs Male of the Body of every such Heir Male, severally and successively, as they should be in Priority of Birth and Seniority of Age. The Chancellor referred the Con-

Consideration of that Case to the Judges of the Common Pleas. Mr. Justice Tracy was of Opinion, that William had a bare Estate for Life; but the other three Judges thought he had an Estate-Tail, and the Chancellor decreed according to the Opinion of the three. Thus much he said in relation to this Clause itself. But he made one Observation from all the seven Clauses in the Will together, that in every one of them the Devisor has given Anne an Estate for Life in the most plain and legal Words imaginable; and it cannot therefore be imagined, that he intended to give the same Estate to Benjamin; since he has uniformly expressed his Thoughts in Words intirely different, and such, as he conceived, were in no ways imaginable to convey such a Meaning. He said, according to the Construction contended for, Benjamin would not be able to make a Jointure, could not raise Six-pence for younger Children, nor cut down a Stick of Timber; and no Man could have expressed himself in the Manner the Devisor has done, if this had been his Intention. But he said, the Construction he submitted to the Court should be, that the Words under the viz. should reduce the general Description of the Word, Heirs, in the first Part of the Clause, to signify Male Heirs; and so to give Benjamin an Estate in Tail Male. But the three Judges, J. Page absent, said, that they were clear of Opinion the Words under the viz. ascertained the general Description of the former, and explained the Meaning of the Testator to be, that Benjamin should have a bare Estate for Life, the Remainder to his Sons in Tail. They thought the Case in Vernon distinguishable from this; for there the Words are by Way of Limitation; here the Words explain one another. Judge Reynolds said so, that the Case in Cro. did not come up to this; for there the Devisor intended, that the Son of S. should take an Estate to himself and the Heirs of his Body, the Remainder to the Heirs of the Body of the Father, which would be a different Estate from his taking the whole as general Heir of the Body of his Father; accordingly the Court gave Judgment for the Plaintiff. Salk. 236.

Anonymous.

MR. Kettleby moved upon the late Act of Parliament for discharging Prisoners out of Custody, that a Person, who was charged in Execution upon the Penalty of a Bond for 203 l. might have the Benefit of this Act, in as much as he had paid all that was due upon it, but 63 l. and the Plaintiff himself had marked his Writ for no more; neither had he sworn, that any more was due to him, when he held him to Bail. But the Court said, that the Words of the Act are, that any Person charged in Execution under 100 l. shall have the Benefit of it; they are not, that any Person who shall be indebted under 100 l. shall have the Relief, and therefore they thought they had no Authority to interpolate in this Case. Mr. Kettleby then prayed, that a Rule might be made upon the Plaintiff to shew Cause, why he charged the Defendant in Execution for more than was due. The Court refused that Motion too; for

What Persons are not intitled to have the Benefit of the late Act of Parliament relating to the discharge of Prisoners out of Custody.

for they said indeed, they do take Care that a Man shall levy no more than is due; but they thought the Plaintiff could not charge the Defendant in Execution at all, if he did not charge him for the whole Sum recovered.

Petrose and Best.

How far the Court will grant an Attachment against the Sheriff for delivering up a Replevin-Bond.

UPON the Defendants having taken a Distress, the Plaintiff gave Security to the Sheriff de retorno habendo, and then levied a Plaintiff in the Sheriff's Court; the Defendants demurred to it, and the Plaintiff had a Rule given him to join in Demurrer; but upon his not doing it, Judgment went against him by Default. The Goods were removed away, so that the Sheriff could not make a Return; but yet Ambar was made, that he had given up the Replevin-bond to the Plaintiff's Attorney, who was one of the Co-obligors. For this Piece of Practice Mr. Fortescue prayed, that the Court would make a Rule upon the Sheriff and the Attorney to answer the Matters of the Ambar; and the Court accordingly granted his Motion. 2 Inst. 340.

Anonymus.

How far the Court will not grant an Information against a Person for Printing of a Will.

MR. Kettleby moved for an Information against the Printer of one of the News-Papers for inserting Mr. Hungerford's Will at full Length in one of the Journals. He said this was a Practice that might tend to great Confusion by discovering Men's private Affairs in their Families; and therefore upon that Account he made this Motion in Behalf of Mrs. Hungerford, the Widow of the deceased. But besides he said, this was a Practice that might tend much to the Prejudice of the Ecclesiastical Courts, if Copies of Men's Wills are allowed to be published in this extraordinary Manner; and he did not know, that those Courts had any Remedy over the Printer in such Case. He observed likewise, that he had a Copy of an Order made by the House of Peers 31 June 1721. that no Person from thenceforth should take upon him to print the Will of a Member of that House. The Court said, that it has been declared to be a Breach of Privilege to print the Will of a Peer; but they thought that was only a Privilege belonging to themselves. If the Party thought proper, they said he might proceed by Indictment; but they refused the present Motion.

Castle and Corbet.

Vide 104.

MR. Kettleby and Mr. Strange moved now, that the Defendant might be bailed, upon account of the Appellant's having been guilty of Delay in carrying on the Suit. They said, the Appellant might have taken out a Venire immediately after Issue joined, which was on the second Day of the Term; this Writ ought to be returnable within fifteen Days; he might immediately after the Return of that Writ have taken out a Writ of Nisi prius returnable within fifteen more; and by that Means the Trial might have come on at the Sittings within

within the Term. But they had an Affidavit to produce, that they had searched the Offices, and found no Entry of a Writ of Venire being so much as taken out at all. They said likewise, they had no Copy of the Declaration given them, nor any Copy of the Issue; so that by this Provice, the Defendant is to lie in Custody all the Vacation; and yet in the first Instance he shewed his Desire of having a speedy Opportunity of clearing his Innocence, when he did not make use of the common Right he had of having a Copy of the Declaration, and making what Advantage he could of the Mistakes, that might be found in it. They said too, the Appellant had very near made a Discontinuance the other Day in her Suit against M^r. Bambridge; for when he was brought up to have his Appearance entered in Pursuance of his Recognizance in Crastino Animarum, the Appellant was not here; but they said, we should take Advantage of it, and so they sent for her. M^r. Reeves and M^r. Lee argued on the other Side, and said, that as this Proceeding was by Original, the Process can be returnable only at the general Return-Days after the fifteen Days from the Teste. They said therefore that the first Return they could have had was Crastino Martini, the twelfth of this Month, so that they could not try the Defendant till the first Sittings in next Term, and then they should certainly do it. They said they could not see what was meant by no Entry's being made of the Venire; they said it was a known Thing, that the Venire is often taken out after the Trial is over. They observed, that the Declaration and Issue were both upon Record; they said the Defendant himself ought to have taken a Copy of them, and not have a Copy of them given him in a vindictive Suit of this Nature. But besides they said, if the Proceedings were not carried on with that Dispatch, as by Law they might have been, the present Suit was an Appeal, a Suit new and difficult; and therefore it was but Prudent in the Plaintiff to be cautious a little in the Proceedings. But this was by no Means a Foundation for the Defendant to be bailed; for there ought to be a visible Neglect in the Proceedings for the Defendant to intitle him to this Favour upon such an Account. The Court said it was certainly true, that the Process could be returnable only at the general Return-Days, and that Crastino Martini was the first; but they said the next Return-day the Nisi prius might have been returnable at, was Quindena Martini, and that was the twenty-sixth of this Month; so that this Cause might have been tried the Sittings within Term. They said the Venire must be taken out in a Suit by Appeal, and tested according to the Truth; and must likewise actually be returned before the Writ of Nisi prius. They said too it ought to be tested the Day that Issue is joined, that an Appeal is recens Prosecutio; and they did not know but the not having taken out the Venire then might be a Discontinuance. M^r. Strange upon this urged it, that it really was one; but the Court said, as the present Motion was only to bail the Defendant, they would not give their Opinions upon that Point. They observed likewise, that if the Process is returnable beyond the Time that is necessary, they would not say, that that would be a Discontinuance; but thus far was clear, it would

shew a Delay in the Suit, and would be a good Foundation to bail; and accordingly in the present Case they agreed, that the Defendant should be bailed. But the Bail-piece not being filled up, and the Master saying, that the last was settled according to Precedent, and that he could not upon his Memory say, what was the Form of it, the Court ordered the Defendant to be brought up again by Rule to morrow. Mr. Taylor, the Plaintiff's Attorney said, that he believed the Appellant need not have appeared to day as it was no Return-day, but only the Defendant moved to be brought up upon a particular Occasion; and therefore, he hoped, the Court would not think it necessary for her to come up to morrow; and the Court seemed to think she need not.

Vide post

The King *and* The Duke of Bedford and others.

When a Rule is granted for an Information in Nature of a Quo Warranto in what Manner the Rule must be drawn up.

MR. Lee came now to shew Cause upon a Rule that had been made against the Duke, to know by what Authority he claimed to be Governor of the Corporation of the Conservators of Bedford Level, and which was likewise made upon several other Defendants, to know why they claimed to be Bailiffs of that Company. He said he was prepared to answer the Ruler upon the Merits; but he had an Exception to take to the Warrant in which the Rule itself was drawn up. He said the Name of the Corporation was intirely mistaken; the 15 Car. 2. cap. 17. has incorporated the Adventurers of this Level by the Name of the Governor, Bailiffs and Commonalty of the Company of the Conservators of the Great Level of the Fens; but the Style of this Company, as drawn up in the Rule, is intirely different. The Court accordingly discharged the Rule; for they said there is no such Corporation as that described in the Rule. Indeed, they did allow, that it is frequent to draw up Rules for Quo Warrantos against the Borough of such a Place generally, without giving them their Name of Corporation. But there they said, there is such a Place as the Borough, but none as Bedford Level. Upon which Mr. Wills moved, that the Court would grant a new Rule against the Defendants, according to the true Description of this Corporation. But the Court said, there must be several Motions made against the several Defendants; and accordingly distinct Counsel moved against each of the Persons.

Andrews *and* Richards.

When an Attorney is present at the Time of executing a Warrant of Attorney to confess a Judgment, how far such Warrant of Attorney shall be good.

MR. Kettleby moved, that a Judgment might be set aside, that was entred up upon a Warrant of Attorney. One Reason for this Motion was, that the Letter of Attorney was obtained from the Defendant when he was drunk; the other, that he was under an Arrest, when he executed this Letter of Attorney, and yet no Attorney of the Court was present for the Defendant upon the Execution of it; but only one for the Plaintiff. The Court said, they did not think either of these Reasons sufficient to set aside the Judgment, as there was an Attorney present; for the late Rule has been not to set them aside,

aside, where there is any Attorney present; and Judge Reynolds said, it is not material whether he is a sworn Attorney or not; nay, it has been allowed to be good, if he is even Clerk to one. But the Chief Justice said, in Lord Prat's Time the Rule was, that the Defendant should have actually an Attorney concerned for him present. However the Court made a Rule upon the Plaintiff's Attorney to attend.

Hopkins and Sir Tho. Jones.

MR. Kettleby informed the Court, that the Plaintiff had obtained a Verdict in a Cause wherein he was Plaintiff against Rich, but that Rich immediately paid him the Money, and therefore Mr. Giles Taylor the Attorney never entered up the Judgment; he said Hopkins had since commenced an Action against the present Defendant, and it would be necessary for this Defendant to have a Sight of the Postea upon the Trial. Therefore he moved, that Mr. Taylor might either attend with the Postea upon the Trial, or else that he might enter up Judgment upon it, and Satisfaction accordingly. But it came out, that the Suit between Hopkins and Rich was in the Common Pleas; and therefore the Court said, the proper Application was there, to have the Judgment entered up; and therefore could do nothing in it. And as to the Postea itself, Judge Reynolds said it was no Evidence.

How far a Postea shall not be Evidence.

Selwood and Methlyn.

ON a Writ of Error out of the Common Pleas in Replevin, upon Demurrer Judgment was given for the Avowant. Mr. Strange now took several Exceptions. He said in the first Place, that the Defendant had set forth in his Avowry, that he was seised in Fee of a House, and thereupon by Indenture between him and the Plaintiff demised the House, with six Acres thereunto belonging, to the Plaintiff for a Term of Years yet to come. Now he observed, that the Avowry was imperfect in this Respect; for there ought to have been a Seisin alledged of the six Acres, as well as the House; and in that an Avowry differs from an Action of Debt. To this Purpose is the Case of Silley and Dalley in Salkeld, affirmed in the House of Lords; and so are all the Precedents. His next Exception was, that the Avowant has set forth 75 l. to be due to him for two Years and a Half arrear; and yet when the Plaintiff has replied as to 24 l. Part of it, that it was not yet due; and the Defendant in his Rejoinder joins issue upon it; he himself afterwards enters a Nolle prosequi as to that 24 l. By this, he said, it appears upon the Avowant's own shewing, that he has avowed for more than is due; and he observed, that a Distress is a Thing intire, and that therefore when the Defendant has abated his Avowry in Part, he has abated it in the Whole. His third Exception was, that the Judgment is to recover the 31 l. Residue pro valore bonorum that were distrained; now he said, this Judgment could in no colourable Manner be maintained but upon the Statute of 17 Car. 2. cap. 7. which allows the Party to have

What shall be said to be a good Avowry.

Exc.

Execution of what shall be in arrear, instead of having a Retorno habendo; but he said that Statute would not maintain this Judgment neither; for it provides the Judgment shall be for the Arrears of Rent; but in the present Case it is 31 l. for the Value of the Goods. He said he did allow, that an Inquest indeed has found the Goods distrained to be but of the Value of 31 l. but he thought notwithstanding, that the Judgment was not exact enough according to the Words of the Act. The last Exception he took was, that as soon as the Demurrer is joined, an absolute Judgment is given, quod querens sit in misericordia; upon that a Writ of Inquiry goes, and then another absolute Judgment is given to recover the 31 l. Now, he said, this is contrary to all the Notions of Writs of Inquiry; for the Party ought to be present in Court at the Time the Writ of Inquiry is awarded; but here is a conclusive Judgment given first, and he is out of Court before the Writ of Inquiry issues. To the first of these Exceptions the Court said, they were of Opinion that this Demise being by Indenture stopped the Plaintiff to take this Exception; which they allowed would have been a good one, if the Demise had been in any other Manner. To the second Exception they said, that it was frequent for the Jury to find less due, than the Defendant has avowed for; but yet the Avowant has Judgment notwithstanding; and therefore they could not think that Exception material neither. As to the third Exception Sergeant Rabey said, that there was an Entry in 1 Saund. 195. exactly as this is. But the Court said, they did indeed think it pretty unintelligible, but however the Avowant might move to amend the Record of the Judgment in this respect in the Common Pleas, and then the Transcript might be set right here. And as to the last Exception the Court observed, that the first Judgment was only quod querens sit in misericordia, and that was at Common Law. The Statute has provided, that besides that a Writ of Inquiry shall go at the Prayer of the Avowant, and that a Judgment shall be given upon that to recover the Sum found to be due by the Inquest. They said this was merely additional to the Proceedings at Common Law, and the Statute did not intend to alter any Part of the other; and therefore they did not think it material, that the Plaintiff was out of Court upon the Awarding of the Writ. However the Court ordered this Matter to stand over.

Vide post.

Tiblin and Edson.

What shall be said to be a good Delivery of an Issue.

THE Defendant pleaded a Misnomer, and the Plaintiff joined Issue upon it. The Plaintiff delivered a Copy of the Issue with a Rule on the Margin to return it the fourth of November, but happened not to deliver it till the Tenth. The Defendant upon this took no Care to redeliver the Issue at all; and upon this the Plaintiff signed his Judgment. Mr. Parker moved now to set the Judgment aside. For a Rule given to return it on an impossible Day, is the same as no Rule at all. And it is not a good Delivery of the Issue, unless there is a Rule given. But Mr. Benton, the Clerk of the Declarations said,

said, that this would be a good Reason, why he need not have accepted of it; but by his having accepted it he was obliged by the Rules of the Court to return it within four Days. Accordingly the Court held the Judgment to be regular.

Anonymus.

A Certiorari was moved for to be directed to two Justices of the Peace of the County of Southampton to remove a Conviction upon the Statute of 12 Car. 2. 23, 36. for not having paid the Excise. The Court said, there were several Statutes which provided that Certioraries should not go in these Cases; and they doubted whether this was not one. But upon the Counsel's saying, that the Words of the Statute were only, that no Certiorari should supersede the Proceedings, he submitted it, that a Certiorari might go notwithstanding. And he observed, that where these Statutes intend that a Certiorari shall not go at all, the Words are much stronger. As the 9th of Ann. 11. provides, that no Certiorari shall be brought or allowed; and accordingly the Court made a Rule to shew Cause.

When a Conviction is made upon the Excise Laws, how far a Certiorari goes in such sort of Cases.

Knute and Myonet.

A Rule had been made to shew Cause, why a Verdict should not be set aside for a Variance between the Copy of the Issue and the Copy of the Declaration delivered, there being no Defence. Serjeant Darnel now said, that the Variance was for the Benefit of the Defendant; for the Copy of the Declaration laid the damnum to be to 1000l. but the Issue only to 500l. But besides, he observed, that the Nisi prius Roll was agreeable to the Copy of the Declaration; and in such Case, he never knew any Complaint of this Nature made to set aside the Verdict. And likewise he took Notice, that the Defendant had accepted of the Issue, and by that Means had waived all Benefit of this Nature. But the Court said, that would be very hard to make a Defendant waive an Advantage of this Sort by accepting of the Issue, when he cannot know at the Time he does accept it what the Declaration perhaps is. They said, they thought it a general Rule to set aside a Verdict, where there is no Defence, upon these Exceptions, as well as upon a Variance between the Nisi prius Roll and the Copy of the Issue; and accordingly set the Verdict aside.

How far the Court will set aside a Verdict for a Variance between the Copy of the Declaration and the Copy of the Issue.

Anonymus.

How far the Court will not proceed in a summary Method relating to Attornies.

Scacc. **M**R. Fenwick moved, that a Promissory Note of 40 l. but not for Value received, given to an Attorney of this Court for Law Charges might be referred to the Deputy to see what was due upon it; and that upon Payment of what was due, Proceedings at Law in this Court might be said. He said there was a direct Imposition in obtaining the Note; and in Fact there was but 20 l. due to the Attorney, when the Defendant gave it. The Chief Baron said, that if it had appeared upon the Face of the Note, that it was given for Law Charges, they might have done it; but here they could not; and the only Remedy is to take Advantage of this Imposition upon the Trial, or to prefer a Bill. But Mr. Baron Carter seemed at first to think that it might upon Motion. And to this Purpose he mentioned Rhodes's Case in Chancery; where even a Bond and Judgment was given; and the Court looked into the whole upon Affidavits, and this even upon a Motion. But the Chief Baron said, that that Case was between Attorney and Client; and there it might certainly be done; but here it was between an Attorney and a third Person. And accordingly the Court rejected the Motion; Baron Carter agreeing, that that might make the Difference.

Smith and Norton.

When a Rule is made on a Sheriff to bring in the Body, what is the proper Method to enforce a Rule of that sort.

THE Sheriff had made a Return of cepi corpus, but would not bring in the Body. Upon which the Plaintiff had obtained several Rules upon the Sheriff to bring in the Body; but the Sheriff still stood out in Contempt; and therefore the Plaintiff prayed now an Attachment against him. But the Court upon hearing the Rules read said, there was not one peremptory Rule; and therefore the Motion for an Attachment was irregular at present. However upon Mr. Parker's desiring then a peremptory Rule, the Court granted it. And in another Case they said that Amercements only used to be the Method of enforcing these Rules, but lately they have granted Attachments.

Fuller and Barnes.

How far the Court cannot order an Attorney to enter Satisfaction upon the Roll.

THE Plaintiff had recovered Judgment in the Common Pleas, which on Writ of Error was affirmed in this Court. Upon that the Plaintiff began to proceed by Writ of Scire facias against the Bail. The Defendant upon this moved the Court, that, upon bringing in the whole that was due, Proceedings might be said, and at the same Time produced an Affidavit, that the Plaintiff was already much over paid; upon which the Court made a Rule then to shew Cause. And now Mr. Parker said, that the Plaintiff had commenced this subsequent Proceeding against the Bail in the Common Pleas; and

and that therefore he submitted it, that this Court could not stop the Proceedings. The Court was very much inclined that the Attorney for the Plaintiff should waive this Right that he had by Law; but however he was resolved not to consent to it. Mr. Strange upon this prayed, that a Rule might be made upon him then to enter Satisfaction upon the Judgment here upon bringing in what the Master should think due; and he said, that he believed would induce the Court of Common Pleas to stay the Proceedings there. But so long as the Judgment here should stand open, he was afraid the Court of Common Pleas would not stay the Proceedings; because if they should stay them, the Plaintiff would yet be at Liberty to proceed here; and they would certainly think, that it was as well for the Plaintiff to proceed in their Court as in this. Judge Reynolds said, that the Court has often thought of making such a Rule to order an Attorney to enter up Satisfaction, but he was afraid they could not do it. However the Court at last agreed to make a Rule upon the Attorney to shew Cause, why all Proceedings should not be staid upon the Judgment here, upon bringing in what was due; and that, they believed would have the same Influence upon the Common Pleas.

Holt and Ward.

MR. Strange having not been able to set aside the Plea, ^{Vide ante 208.} that is mentioned before, upon Motion, thought proper to demur to it; and now the Demurrer was argued. He took Notice, that the present Proceeding was by Bill; and therefore there was no Pretence for the Defendant to have Advantage of this Plea upon the Statute of 1 Hen. 5. 5. of Additions. And he observed, that the present Title was nothing but an Addition to his Name; and by no Means stronger, than if the King should create a Corporation, and appoint one by Name the Mayor of it, commanding that he should be received as such, and allowed and called so by all Persons; yet he submitted it, that if a Suit was against the Mayor within the Year by Bill in his private Capacity, it would not be a good Plea for him to say, that his Stile of Mayor was omitted. However, he said, that was a much stronger Case, than where a Man is barely elected Mayor of a Town. Serjeant Chapel on the other Side observed, that there was occasion for him to say very little, because this Case was in Point determined for him in 3 Cro. 224. Though he did allow, that this Case is afterwards doubted in Page 542. in that Book. The Court held the Plea to be good in the present Case; and put it upon this, that the Title of Clarencieux is Part of the Defendant's Name, and not an Addition to it. But in the Case put of the Mayor, they said, that was merely an Office; and therefore was not like the present Case. Accordingly Judgment was given, that the Writ should abate. 1 Lev. 248.

Vide. P. C. post

333.

The

The King and —

SOME Days ago, when Mr. Marsh was in Court, who was of Counsel with the Prosecutor, Mr. Lacy moved, that one of the Judges would be pleased to speak to Lord Chief Justice Eyres, who tried the Cause, in order that the Defendant might submit to a small Fine. Accordingly Judge Probin reported, that Lord Chief Justice Eyres informed him, that it was an Indictment against the Defendant for opposing the Wardens of the Coopers Company in London, in taking away some Brewing Vessels, which did not contain full Measure, and yet were used by the Defendant in his Trade of a Brewer. But that the Chief Justice informed him likewise, that it was an old obsolete Statute, which the Indictment was founded upon, namely, the Statute of 23 Hen. 8. 4, 7. and that it appeared doubtful to him upon the Trial, whether the Wardens could justify taking the Vessels away, though they might burn them upon the Spot; and therefore that he thought the Defendant deserved to have but a small Fine set upon him. Serjeant Darnel and Mr. Marsh now said, that the Law was a very useful and necessary one, and that it did not only give the Wardens of the Coopers Company of the City of London this Power, but extended likewise to the Chief Officers of every Corporation in England, and gave them the same Authority by the 9th Sect. in the Statute. They said likewise, that the Words were express in giving the Wardens Power to take Vessels away; and that this Prosecution was carried on for publick Example. The Court look'd upon the Statute; but said they did not know where they should end, if they should allow a Judge's Report to be arraigned; and that if the Prosecutor had any Exceptions to the Judge's Directions upon the Trial, his Counsel should have mentioned this when the Defendant moved before to have the Report of the Judge. Upon which Serjeant Darnel said, that he was not in Court at the Time of the former Motion; and Mr. Marsh said, though he was, yet they had had no Notice of the Motion; and therefore it was not his Business to say any Thing to it at that Time; and now without any Thing farther, but Notice that the Court will be moved, that the Defendant should submit to a small Fine, the present Matter comes before the Court. So that the Counsel said, they had had no Opportunity to apply to the Judge; and therefore moved, that they might have now Leave to apply to him; or at least, that the Defendant might be obliged to talk with the Prosecutor, before he submitted to a small Fine; and the Attorney in the Cause said, that he had applied to the Chief Justice at his Chamber, and that the Chief Justice told him he believed the Court would allow the Prosecutors their Costs. The Court said, that these Objections to the Report should have been made before the Report was delivered; and Judge Probin said, after that they would never allow a Judge to be attended again. The Court said likewise, that a Defendant never talks with the Prosecutor after a Judge's Report; and they would never

never hear one Part of the Report from a Judge of this Court, and another from any Body else. Accordingly let a Fine only of 6 s. 8 d. upon the Defendant.

Holmes & Ux' and Wood.

MR. Filmer now argued again for the Defendant, and said, Vide 75. that the single Question for the Opinion of the Court was, whether this Action would survive or not to the Wife. Now, he observed, that every Husband has a Right to the Benefit of the Skill and Labour of his Wife, and that she is to be considered in Law merely as a Servant to him; that therefore as the Consideration must be considered merely as moving from the Husband, the Husband solely can have the Benefit from it. Then as to the Exchequer-Chamber Case cited upon the former Argument, he said, later Resolutions have been against it; and to this Purpose he cited the Case of Buckley and Collier reported in 4 Mod. 156. and 1 Salk. 114. But besides, he said, the Plaisters must doubtless have been provided with the Husband's Money; that Part of the Consideration must therefore have wholly proceeded from the Husband; and consequently the Wife can by no Means have the Benefit of a Promise founded at least in Part upon the Husband's Aa; to this Purpose he applied the Case in 2 Lev. 20. He said likewise, there was another Reason to be given, why the Wife ought not to have been joined with the Husband in the present Action; because the second Count has laid the Promise to be made to the Wife to pay the Husband for the Cure; and especially this must be bad, as intire Damages are given. But Mr. Reeves argued on the other Side, that the Skill and Labour of the Wife is personal to herself; and therefore sufficient to raise an Assumpsit for her Benefit; at least an express Assumpsit, if not an Assumpsit in Law. And he said, the Case in Salkeld is far from denying the Exchequer-Chamber Case to be Law; but indeed the very Distinction is there taken between an Assumpsit in Law, and an express Assumpsit. And in the Case of 4 Mod. the Exchequer-Chamber Case does not appear to have been cited. But besides this great Authority the same Point is settled likewise in 2 Cro. 205. And a Case equally strong with these is in 1 Rol. 32. Foster and Childer, where a Man promised a Woman 10 l. in Case she would not oppose her Husband in levying of a Fine; and yet in Arrest of Judgment it was allowed, they might both join in bringing the Action. Then to the second Exception, he said, the Court will intend every Thing in Favour of a Verdict; and it may be supposed therefore, that the Wife procured the Plaisters of a Friend, and not with the Husband's Money. And he said the Case in 2 Lev. does not warrant the Exception; for there the Clothes that were torn, were laid to be her's, and consequently they must have been the Property of the Husband. Then as to the last Objection, Mr. Bootle junior, gave an Answer to it, that there are many Instances, where a Man can bring an Action upon an Assumpsit, and yet he can receive no Benefit from it; as if A. promises B. to pay C. a Sum of Money, it has often been de-

terminated, that B. may bring an Action upon this Assumpsit as well as C. The Chief Justice and Ju. Reynolds said, that for their own Part, they thought it a fundamental Rule, that a Husband had a Right to the Benefit of the Skill and Labour of the Wife, and that the Wife therefore could not support an Assumpsit upon it. And as to all the Points they inclined for the Plaintiff. However, Ju. Page absent, it stood over. Salk. 637. And afterwards in Easter Term Judgment was arrested.

The King and Acton.

When a Person is brought up by Habeas Corpus, how far the Court will not allow him to be bailed.

How far Copies of Informations taken before a Justice of Peace shall not be allowed to be read.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Commitment, that the Defendant was charged generally with the Murder of one Crane. Mr. Strange said, that he had got Copies of the Informations taken before the Justice at the Time of the Commitment, by which it would appear, that this Crane was a Prisoner to the Defendant, and that the only Foundation for committing the Defendant for murdering him was, that he put him into a Place, called the Strong hold, and by Occasion of that he died. He said, the Copies of these Informations were given by the Justice of Peace. But to shew, that the Unfitness of this Place could not be the Occasion of Crane's Death, they had Affidavits to produce, that the Defendant had already been indicted for the Murder of four other Persons, by putting them into this Place; it was fully proved, that they were all put in; but yet the Defendant has been already acquitted upon every one of them. But besides he observed, it was plain, there has been a Delay in this Prosecution; this Commitment bears Date the third of September; the Defendant has since been indicted and acquitted for all the other Facts; but has not yet been indicted for this. For which Reasons Mr. Strange moved, that the Court would allow the Defendant to be bailed. But the Court said, that it was a Proceeding intirely unprecedented to lay before them Copies of Informations of this Sort upon such an Occasion; that Evidence of this Sort was only to be laid before a Grand Jury; and therefore refused it to be read. They said too, that the Defendant had not yet lain long enough to intitle him to be bailed for Want of Prosecution; and therefore refused to bail him in the present Case. Salk. 104. Skin. 683.

The Vill of Appelthwaite in the Parish of Windermore
ver. The Vill of Hartfop and Batterdale in the Parish
of Barton.

Vide 209.

MR. Fazakerly came now to shew Cause. He said the Body of the Order recites only, that the last Settlement of the Persons removed is in Appelthwaite, and not said in the Will of Appelthwaite; and therefore there was no Occasion to intend that Place to be a Will; it might as well be a single House, going under that Name; and therefore it did not appear upon the Order,

Order, that the Place is within the A^{ss}. But he said if he should admit, that Appelthwaite was a Will, and that therefore the Will need not to have received the Persons sent to them, as the Order was not directed to the Overseers of the Will; yet when they had received them, he submitted it, whether they were not obliged to keep them. He said, if an Order was directed to the Parish of A. generally, and the Parish received the Persons so sent to them, he did not see why the Parish of A. were not bound to keep them, though the Order was not directed to the proper Officers. He observed, that it was a known Law, that if a Justice of Peace directs his Warrant to a private Person, and the Party, whom the Warrant concerns, submits to it, he cannot afterwards complain, that the Warrant was mis-directed. The Court said, that Appelthwaite cannot be intended to be a single House; for then the Order could not have charged that Place with the Receipt of the Poor. But they said it must be intended to be a Will. They then observed, that the Parliament has appointed particular Persons, whom Orders shall be directed to; and that therefore every Mis-direction makes the Order bad in itself; and consequently no Acquiescence under it could make it good. Accordingly the Court made the Rule absolute for quashing the Orders. Salk. 176, 247.

Anonymus.

THE Plaintiff's Attorney sent the Paper-Book to the Defendant's Attorney, at Ten o'Clock at Night; and by Ten the next Morning the Defendant's Attorney joined in Demurrer, and came to the Plaintiff's Attorney to pay him for the Paper-Book. But the Plaintiff's Attorney said then, that he had sent his Clerk already to sign Judgment. However the Defendant's Attorney left the Money for the Paper-Book upon the Desk, though the other refused to accept it. And Mr. Benton informed the Plaintiff's Attorney, that he had signed his Judgment regularly; for the Defendant's Attorney was obliged to have joined in Demurrer that Night the Paper-Book was sent him, or at least very early the next Morning. But the Court thought the Judgment a little too Quick; accordingly referred it to the Master.

How far a Person shall not be allowed to sign Judgment for not paying for the Paper-Book.

Pulton and Heath *ver.* Farrar.

THE Defendant had a former Cause in this Court, wherein he was Plaintiff, and one Bateman Umphry Defendant; and in that he was served with Notice, that the present Plaintiffs, who were two Bailiffs, would justify as Bail; and one of them sent him a Letter, that if he had any Thing to say to them, they should be at the Coffee-house, next Westminster-Hall Gate the Morning they should justify. The Defendant attended the Motion accordingly; and as soon as they had justified, and the Defendant went out with them to Westminster-Hall Gate, they procured

How far a Person shall not be allowed to be arrested by Reason of his attending the Business of a Court.

procured him to be charged with an Action at their Suit of 100l. Upon this Matter the Defendant moved now, that the Plaintiffs might answer the Matters of the Defendant's Affidavit, for arresting the Defendant when he was attending the Business of this Court. And the Court made a Rule accordingly.

Birk and Leek.

Vide 210.

MR. Reeves now said, that this Case stood for the Resolution of the Court. The Chief Justice said, that they were of Opinion as to the first Exception, that there was no Variance between the Original and Declaration; and as to the second Exception, they relied upon the Case of Rowning and Lord Carteret. So affirmed the Judgment.

Anonymus.

How far a Mandamus will lie to admit a Register into an Office.

Vide post

MR. Reeves moved for a Mandamus to be directed to D^r. Ward, Judge of one of the Archbishop's Courts of York, to admit a Deputy into the Office of Register. He said, the Office of Register was for Life, and exercisable by the Register himself or Deputy; the Custom of this Place has been, that the Deputy should be sworn in by the Judge of this Court, though the Deputy is only at Pleasure. He cited the Case of the Corporation of Bedford, where a Rule was made for shewing Cause a Term or two ago, why a Mandamus should not go to admit the Deputy-Recorder, and yet the Deputy was not for Life; Lord Bruce was the Recorder, and he indeed was for Life. M^r. Masterman said, that Case was so; accordingly the Court made a Rule to shew Cause; but they said, they must hear the other Side.

Jones and Newbank.

How far the Court stays Proceedings on one Notice of Trial, till the Costs of a former one are paid.

MR. Kettleby moved yesterday, that a Rule might be made to stay the Plaintiff's Proceeding upon a second Notice of Trial, till he had paid the Costs of the former Notice. The Court said then, that the old Rule was to grant these Motions only in Cements; and upon that asked him what his Action was; but M^r. Kettleby not being instructed in it, the Court ordered him to move it again. He now said, that he had not yet seen his Attorney, and therefore could not inform the Court what the Action was; but he would suppose it to be an Assumpsit, one of the strongest Cases against him, and yet he submitted it, that by the Rules of the Court he was intitled to his Motion. He said the Court made the same Rule in the Case of Smith and Lideot, Pasch. 1 Geo. 2. The Court seemed inclined to think, that lately they had gone farther than the old Rule. But then they told M^r. Kettleby, he was still irregular in not having an Affidavit, that he had demanded the Costs of the Plaintiff.

Mr. Kettleby said, it was true he had not such an Affidavit, but he had one, that they had made strict Search for the Plaintiff, and could not find that there was such a Person in the World. Therefore he moved upon this Affidavit, that a Rule might be made upon the Attorney not to proceed without paying the Costs of the former Nonsuit himself. The Court said, such Sort of Motions are frequent on the other Side of the Ball, but they did not know they had gone so far on this. Upon this Serjeant Girdler said, that he himself was concerned in a Cause of Newman and Royce in Lord Chief Justice Pratt's Time, where the Court made a Rule, that Proceedings upon the second Notice of Trial should be staid, till the Plaintiff's Attorney paid the Costs of the first; and this was done upon an Affidavit, that the Plaintiff was beyond Sea. Accordingly the Court made a Rule upon the Attorney to shew Cause. Vide post.

Castel and Bambridge and Corbet.

MR. Kettleby and Mr. Strange moved now, that the Defendants might be discharged for a Discontinuance in the Prosecution. The Writ of Appeal, they said, was returnable the third Day in the Term; Issue joined of the second Day, but entered as of the first; but yet they had an Affidavit to produce, which was made but two Days ago, that all this while they had not taken out a Venire. They said, if the Fact was so, this was a Discontinuance; and the Case of Bradley and Banks reported in 2 Cro. 283. Yelv. 204. is in Point to this Purpose. Mr. Reeves on the other Side produced a Venire, tested the first Day in Term, and returnable to Day, which was Quindena Martini. Mr. Kettleby and Mr. Strange then looked upon the Writ, and found upon the back of it, that the Writ was made out the 2d Month of our Sherriffalty; by this they said it appeared the Writ was made out in the Month of November for the Sherriffs of London were appointed in October; and therefore here was a long unnecessary Interval of Time between the Return of the Appeal and the making out the next immediate Process. This farther appeared too, from the Venire's being under the Seal of the Court the twentieth of this Month. But the Court said, the Cases relied upon by no Means warranted the present Exception; for there the next Process was tested seven Days after the Return of the first. But here it is tested the very same Day. And, they said, no Instance could be given, they believed, where it was held, that the next Process must be taken out actually the same Day with the Return of the first. The Defendant's Counsel then took an Objection, that at least the Venire ought to be returned on the first proper Return-Day, and that was Crastino Martini; but the present Writ is returnable Quindena Martini. Mr. Reeves answered to this, that there is a Precedent in Rast. 47. exactly as this is, and upon that he relied. And upon a former Motion when a Complaint was made against the Appellant for not having had a Return of her Venire as soon as she might, Mr. Taylor, the Attorney said, that the Reason was, because there was forced to be a Return of a great many Jurors upon the Panel. The Court said, this was a Point, which very well deserved to be spoke to, and there-
T r r fore

foze desired, they might be attended with Precedents, before they would give their Opinion. The Defendants thinking, that the arguing of this Point might be some Delay, desired rather to waive it, and go to Trial upon the Merits as soon as they could. But then their Counsel desired, that the Return to the Venire might be filed, as it was now in Court. But the Court said, the Venire was brought in by the Appellant's Attorney, and not by the Sheriff, for this particular Purpose, to shew, that they had not been negligent in the Proceeding; and besides the Sheriff has the whole Day to make his Return in, and they could not tell but he might have Occasion to alter it; accordingly the Court did nothing in it.

Vide post.

Selwood and Methlyn.

Vide ante
243.

THIS Cause came on now in the Paper again. The Defendant had obtained a Rule for shewing Cause in the Common Pleas for the Amendment; but the Court said, there was no Occasion to apply there any farther, they themselves could amend the Judgment as well, if there was any Occasion for it; and where a Judgment is for a Defendant they could even give a new one for the Plaintiff. This, they said, was determined in Sloper's Case. But in the present Case upon farther Consideration they thought the Judgment, as given, was good already; so affirmed the Judgment. 4 Mod. 127. 1 Salk. 53, 262, 401, 580, 632.

Kenfeild and Bambridge.

How far a
particular
Performance
of a Condi-
tion must be
set forth in
Pleading.

IN Debt upon Bond, the Defendant craved Oyer of the Condition, which appeared to be, that whereas the Defendant had entered into a Society with certain other Persons, and a Chest belonging to the Society was lodged in the Defendant's Hands, if the Defendant should deliver up the Chest, when the Majority of the Society should demand it of him, then the Obligation should be void. And then pleads Performance of the Condition generally. To this Plea the Plaintiff demurs specially, because the particular Performance of the Condition was not set forth. And Mr. Fazackerly now demanded Judgment for him. Mr. Strange did not attempt to defend the Plea; but said, that the Defendant had not joined in Demurrer, and therefore the Court could not give Judgment. But Mr. Fazackerly said, that then they would sign their Judgment for want of a Joinder in Demurrer. But Mr. Strange said, that the Plaintiff could not do either; for it was his own Fault not to enter the & prædictus Defendants similiter, which it was his Business to have done. And then, he said, when the Paper Book is delivered to the Defendant, and he will not stand to it, he must not redeliver it; and in that Case he did allow the Plaintiff might sign Judgment. The Court said, it was clear they could not give Judgment, either upon the Demurrer, or for want of joining in it. And as to the signing it, the Parties must do as they can. However the next Term this Cause stood in the Paper again, and then upon Mr. Fazackerly's praying Judgment, the Court gave it.

Pyle and Grant.

THIS was an Appeal of Murder; the Defendant had had Judgment of Death pronounced against him upon a former Indictment; but received the King's Pardon. Mr. Reeves upon a former Motion allowed, that his Majesty's Pardon would not be a sufficient Foundation for the Court to bail the Defendant; because Acts of Mercy of this Sort are many Times shewn, though the Fact is palpably clear; but yet in the present Case, he hoped he should be able to shew, that the Evidence, upon which the Prisoner was convicted, was to the Dissatisfaction of the Judge who tried him; and that therefore would be a good Foundation for the Court to exercise this discretionary Power; and accordingly he moved, that one of the Judges would be pleased to speak with Baron Commins, who tried the Prisoner, to report what the Evidence was. The Court allowed that he should; and accordingly Judge Probin now stated the Evidence specially as it was; and said, that Baron Commins concluded upon the whole, that it was such, as he thought the Jury would have acquitted the Prisoner upon; but yet when the Jury had brought him in guilty, he pronounced Sentence of Death against him, and ordered him to be executed within a Month; however, that he thought he might be bailed. But Judge Probin said, that he asked the Baron, whether upon the whole he was satisfied or dissatisfied with the Verdict; and he could get no farther Answer from him, than in the Manner he had mentioned. Mr. Reeves upon this, without any Thing farther, prayed, that the Defendant might be bailed. Mr. Fortescue on the other Side said, that he believed there were no Instances to be given, where the Court has bailed a Defendant in a Suit of this Nature, unless he had been acquitted upon an Indictment before, or else Delay or Malice could be shewn in the Proceedings upon the Appeal. He said, the present Method of applying for a Judge's Report was very new; therefore he hoped upon that account, as well as because it was at least doubtful whether the Defendant was not guilty of Murder, that the Defendant should not be admitted to bail. Mr. Reeves said, that he should make no Observations upon the Report, but leave it wholly to the Judgment of the Court. He said, he would take it, as Mr. Fortescue himself has allowed it, that the Case is doubtful; but he submitted it, that that would be a Reason for the Court to bail in the present Case. He observed, if the Case had been, that the Fact was stated so upon the Appeal, as that it was doubtful, whether it was a Murder in the Defendant or not; and upon Demurrer the Court thought proper to consider of it a little; that he submitted it, would be a Reason to bail; and the present Case and that, he said, were much the same. But besides he took Notice, that the Writ of Appeal was returnable the first Day in Term; the Return did not come in till the Middle of it; all this while the Appellant never called for a Return; so that, he said, there was a plain Delay in the Suit. But the Court said, that the present Method is entirely new of applying for a Judge's Report in Cases of this Nature

How far the Court will not bail a Person in an Appeal for Murder.

ture ; and therefore they thought it ought to be used with a great deal of Caution ; and in no case to be allowed, but where the Judge reports the Verdict to have been contrary to Evidence, or at least that he was not satisfied with the Verdict. Now, they said, he has not reported this, and his ordering the Prisoner for Execution is a Fact manifestly shewing, that he thought the Verdict right. The Chief Justice said for his own Part, that the Circumstances of the Evidence stated upon the Report would have induced him to have certified that he was not satisfied with the Verdict ; but as the Judge would not affirm so much, the Court said, they did not think there was enough reported to bail the Prisoner. And as to the Demurrer, the Court said, they should not have thought that sufficient, unless the Court had been of Opinion for the Defendant, and the Appellant prayed a Day. Then to the last Matter, they said, the Defendant might have come in voluntarily the Day of the Return of the Appeal, and demanded the Plaintiff. So the Appellant might have come at the Day, and arraigned the Defendant ; in either of which Cases the Court will pronounce Judgment, if the other Side does not appear. But in the present Case, the Defendant did not appear, no more than the Plaintiff ; and therefore he could not take Advantage of this Matter. Accordingly the Court refused to bail the Defendant. 1 Salk. 64, 455.

Potter and Layer.

What shall
be said to be
a Will, what
only a Deed
of Appoint-
ment.

Canc. **T**HE Widow of Christopher Layer being seised of certain Copyhold Lands surrendered them to the Use of herself for Life, with several Remainders over, subject nevertheless to be revoked, and new Uses to be declared by any Deed or Will that she should make, subscribed in the Presence of three Witnesses ; sometime after she did execute an Instrument in the Presence of three Witnesses, and thereby limited the Uses to the Defendant and his Heirs after her Death, which Defendant was her Son and Heir. Soon after this she entered into Marriage Articles with the Plaintiff, and covenanted for herself and her Heirs to surrender the Lands in Question within two Years after the Marriage to the Use of the Plaintiff for Life, the Remainder to herself for Life, the Remainder to the Heirs of the Husband, and to do this by a proper Conveyance signed in the Presence of three Witnesses, according to her Power. The Marriage accordingly took Effect, and within the two Years she did make a Surrender accordingly by Deed subscribed in the Presence of two Witnesses ; but this Surrender proved an ineffectual one. The Wife died ; the Heir entered ; and a former Bill was brought against him by the present Plaintiff to deliver up the Writings. In that Bill the Title he set up was under the Conveyance signed in the Presence of two Witnesses, as being a good Execution of the Power of Revocation ; and waived the Surrender. The Defendant pleaded to that, that the Instrument subscribed in the Presence of three Witnesses was a Deed of Appointment in Favour of him ; and that thereby the Power of Revocation was executed. And at the same Time

Time demurred likewise to the Bill, it appearing upon the Face of it, that the Plaintiff had not a Title; his Conveyance being not executed with the proper Circumstances. Accordingly that Bill was dismissed. The Plaintiff now brought a new one, and the Prayer of this Bill was, that the Covenant in the Marriage Settlement might be carried into Execution; and that the Defendant might either be compelled to make an effectual Surrender to the Plaintiff by Deed subscribed in the Presence of other Witnesses to the Uses mentioned in the Covenant, or else that a sufficient Security may be made to him in some other Way, as the Court shall appoint. The Defendant put in the same Plea as he did before, and likewise the same Demurrer. This Matter was argued now at the Chancellor's House, and the Attorney General and Mr. Wills were Counsel for the Defendant, and the Solicitor General and Mr. Lutwyche for the Plaintiff. As to the Plea the Plaintiff's Counsel urged, that the Instrument set up by the Defendant was a Will, and not a Deed of Appointment. And this, they said, appeared by several Clauses in it, as by its being called a Will, by Word Devise being used in it, and by appointing the Uses to the Defendant after her Death. And a stronger Case of a Will was cited out of 1 Mod. 117. If this was so, they said the Defendant then claimed merely as Heir at Law; and he must be bound according to the Intention of the Covenant to execute an effectual Conveyance. They said they must allow, if a Person by any Conveyance executes a Power he has, and does not observe the proper Forms attending the Execution of it; a Conveyance of that Sort can no more be good in Equity, than it is at Law. But they observed it was manifest on the other Hand, that where a Covenant is made to execute a Power; and the Power is not duly executed in Pursuance of it, a Court of Equity will give Relief, and order the Party or his Representatives to execute a Conveyance according to the proper Circumstances required. And this they said was Lord Coventry's Case. The Chancellor said, the Matter of the Plea is proper to be considered upon the Hearing of the Cause, and then it will be proper to determine whether the Instrument is a Will or Deed of Appointment; accordingly ordered the Plea to stand for an Answer, and the Demurrer to be over-ruled.

Nightingale Executor of Sir Robert Nightingale *ver.* Dodd
Executor of Chamberlayn.

Canc. **O**NE Bohun had been subpoena'd to answer certain Interrogatories in this Cause, whether he had any Dealings with Sir Robert Nightingale or Mr. Chamberlayn, and upon what Account those Dealings were. Bohun demanded Judgment upon this, whether he was obliged to answer these Interrogatories; because the Executor of Sir Robert Nightingale had before brought a Bill against Bohun, and by Decree Bohun was obliged to account with him, which account was now depending. Now Mr. Verney urged, that these Interrogatories plainly concerned the Witness in Interest; for he would be ob-

How far a Person shall be a good Witness in Equity notwithstanding an Objection of his being interested in the Cause.

ligned by this Means to confess the whole State of the Account between Sir Robert and him. And this he observed, was a direct Artifice; for in a former Cause Sir Robert's Executor brought his Bill jointly against Chamberlayn and Bohun; he could not there gain his Purposes upon Bohun; now the Executor brings a fresh Bill against Chamberlayn only, and drops Bohun, and thus by a Side Wind are these Matters, which Bohun had been examined to upon Interrogatories before to be examined into upon Interrogatories again. He observed that it was a settled Rule, that no Witness should be examined to a Matter, that concerned himself in Interest. He did allow, that generally speaking a Demurrer of this Nature must be verified by Affidavit; but there could be no Reason for it in this Case; because the Matter of Fact appears upon the Records of the Court; and those he hoped should be allowed to read. He said he did allow too, that a Witness could not refuse answering, because the Interrogatories are foreign and impertinent; but in the present Case, he thought there was a Necessity for doing it on Account of his being interested in the Question. The Attorney General on the other Side said, that it was not so much as once said in the Witnesses Demurrer, that it would be a Prejudice to him to answer; he only refers to the Acts of the Court, and appeals, whether it does not appear by them, that it must be to his Prejudice. He observed too, that every Demurrer must contain in itself sufficient Matter, and is not to be supported by Matter dehors; he said, by the same Way of Reasoning that the Interrogatories in the other Cause might be read, the very Answer and all the other Proceedings might; and that would over-turn the constant Course and Method observed in Things of this Nature. Besides in the present Case he said, there really could come no Damage to the Witness; a general Question is only asked him what Sort of Dealings he had with the Defendant or Sir Robert Nightingale, and not a particular one, what the Individuals of these Accounts were. Mr. Verney urged in his Reply, that the Witness must necessarily be obliged to discover the Individuals of his Dealings between Sir Robert and Mr. Chamberlayn. He said, upon a Bill brought against a Man, he must allow, he would be obliged to answer upon Oath; but there he has the Assistance of Counsel to draw his Answer; whereas in the present Case he is intirely unguarded. The Chancellor said, as to reading the Interrogatories in the other Cause, he thought he might well allow it; accordingly many of them were read. But as to the Demurrer at last he thought proper to over-rule it; and accordingly ordered the Witness to answer. But because the Reason of this Case depends upon the particular Circumstances of it, it may be necessary perhaps to mention the particular Circumstances attending it. Sir Robert Nightingale going to the East-Indies, intrusted from Time to Time Chamberlayn and Bohun with several of his Effects. To have an Account of which his Executor after his Death brought his Bill against them both. Bohun brought his Cross-Bill to have an Allowance for several Matters, which he had transacted for Sir Robert, and on both Causes he was decreed to account, and to deliver all Books and Papers relating thereto

thereto on Oath before a Master, and to be examined on such Matters as the Master should think fit. Chamberlayn put in three insufficient Answers, and in his Fourth swore, that the Effects of Sir Robert Nightingale were so intermixed with his own, as that he could not possibly render an Account of them. The Chancellor on the Hearing of that Cause being of Opinion, that the Plaintiff could have no more from Chamberlayn than his positive Oath, unless he could by Witnesses ascertain the Effects of Sir Robert: the Plaintiff filed a Bill now against Dodd the Executor of Chamberlayn only, in order to have the Benefit of Bohun's Testimony against him. Now the Chancellor upon the Hearing of this Cause said, that it was a Right which the Plaintiff had to pursue the Effects of Sir Robert wheresoever he could find them; and that as he could get no Satisfaction from Chamberlayn by his Answer, it was a proper Question to ask Bohun, whether he had not received any Effects of Sir Robert Nightingale from Chamberlayn, and that this was allowable in Order to charge Chamberlayn, notwithstanding hereby Bohun might possibly charge himself. Salk. 283, 69c.

1 Vern. 165.

The King and Hill.

MR. Fortescue moved for an Information against a Bailiff for carrying a Person, whom he had under an Arrest, to an Ale-house against his Will; this being an Offence against the late Act of Parliament, pass'd in the last Sessions; and this he prayed notwithstanding the Process was out of the Common Pleas. He said, he did allow, that there was a Clause in the Statute, which gave the Party injured a Liberty to proceed in a summary Method, by Petition to the Court out of which the Process issues; but he submitted it, the Party had a Right to waive that Liberty, and to proceed in the ordinary Course of Justice notwithstanding. The Court said, that might be a Matter proper to be considered of; so made a Rule to shew Cause. 1 Salk. 45, 460.

How far the Court grants Informations against Bailiffs.

Vide post

Addey and Hutchinson.

THIS was a Writ of Error upon a Judgment in the Common Pleas; Want of an Original and Warrant of Attorneys was assigned for Error. The Defendant came in gratis without any Process, and pleaded Instantly in nullo est erratum. Mr. Gill said, that by doing this the Defendant has confessed the Errors, for he has thereby prevented the Plaintiff from taking out a Certiorari to verify them. He said there were two Cases in Salkeld 267, 268. in Point to this Purpose. And therefore he hoped the Judgment should be reversed. Which the Court accordingly did. And the next Case being of the same Nature the Court reversed that Judgment likewise. 6 Mod.

206, 236.

What shall be said to be a Confession of an Error which is assigned upon Record.

Pyle

Pyle and Grant.

Vide 255.

MR. Reeves moved now, that there might be a Trial at Bar in this Case next Term. Mr. Fortescue opposed it upon an Affidavit, that the Appellant's Circumstances were so very small, that he could not bear the Charge of it. He said too, next Term was an issuable one; and therefore by the Rules of the Court, the Trial could not come on then. But the Court said, the general Rule of the Court was, that Appeals should be tried at the Bar. They did allow, they might be tried at Nisi prius; but in Experience they never knew one tried there. They said Suits of this Nature are filed in the Law-Books Suits of Revenge and not of Satisfaction; and therefore the Circumstances of the Appellant were out of the Question. In Bowen's Case and Slawterford's Case the Circumstances of the Appellants were in all visible Appearance exceeding low; but yet the Court there would not allow this Argument of any Weight; and both were tried at the Bar. The second Inducement the Court thought likewise as immaterial as the first; for in a Case of this Nature, they should certainly allow the Trial to be next Term. Accordingly the Trial was appointed for that Time. The Court then began to consider of a Day convenient for it. The Venire, they said, must be tested the first Day of this Term, when the Writ of Appeal was returnable, and not the Day the Parties appeared on. The Trial, Judge Reynolds said, might be as soon as the Distingas is awarded and before the Return of it; but as the End of the Term was so near, the soonest the Trial could be was the next Term, and the Distingas might be returnable the first Day of it. But the Court said, that would be an inconvenient Day for the Trial; however they might adjourn the Jury from that Day to any other before the next Return. Accordingly Tuesday in next Term was agreed to be the Day. And in these Trials at Bar the Court said, the Rule is always drawn up with a Clause, that the Jury shall be struck by the Master, without any special Direction.

Shelton and Osborn.

What shall be
said to be a
good Decla-
ration in an
Action
brought a-
gainst a Car-
rier.

THIS was a special Action upon the Case, wherein the Plaintiff declared, that whereas the Defendant had undertook to carry a Ware for him from such a Place to such a Place, he did carry it accordingly Part of the Way; but lost it in the Carriage; which he laid to his Damage of 10 l. Upon Demurrer to the Declaration, Serjeant Hawkins took several Exceptions. The first he took was to the Gift of the Action. He said the Plaintiff had not declared, that the Defendant was a Carrier, and so by the general Custom of the Realm was bound to convey safely the Goods he undertook to carry; in the present Case therefore it must be taken, that the Defendant was a mere private Person; but yet the Plaintiff has set forth no Consideration, and therefore it appears upon the Face of the Declaration,

tion, that the Promise was merely a *Nudum pactum*; and consequently the Action would not lie. This he said, went to the Substance of the Action; and therefore they had not shewn it specially for Cause of Demurrer; he submitted it therefore, that the Action could not have lain, if the Value of the Thing undertaken to be carried had been ever so great; but the Value of the present Thing was so inconsiderable in itself, that if a good Consideration had been laid, no Action could have been brought in this Court. The other Exceptions he took, were specially shewn for Cause of Demurrer. The first was upon an Admission, that the Defendant was to be taken to be a common Carrier. As to that he said, a late Act of Parliament for the Preservation of the Game has made it unlawful for a Carrier to carry a Hare, unless he has a Certificate, that it was killed by one who was qualified; this therefore ought to have been laid in the Declaration, that the Defendant had such a Certificate, or otherwise the Promise would be to do an unlawful Act. The other was, taking it either Way, that the Defendant was a Carrier or not. Now that was, that the Promise is only laid by Way of Recital; and therefore not traversable. The Court said, a common Carrier is bound by the Law of England to convey safely the Things delivered to him; and therefore without laying a general Custom, he must begin to carry, as well as perform safely the Carriage of every Thing he has in Charge; and this without any express Consideration. An indifferent Person is not obliged without a Consideration to enter upon the Carriage of Goods, he undertakes to convey, but if he does, he must perform it. This they said, was the Case of Cogs and Barner. And the Inconsiderableness of the Thing in itself could make no Difference as to an Action being brought in this Court; because it might be attended with great Prejudice. They then observed, that the Statute does not make the Carriage illegal in itself without a Certificate; but only sets a Penalty for it to be recovered in a proper Action. And as to the last Exception, they said, the Promise was merely an Inducement to the Action, the Mis-performance only the Foundation of it; and therefore Non Assumpsit could not be the Issue, but Not guilty. Accordingly J. Reynolds and J. Probyn being only in Court, Judgment was given for the Plaintiff. 1 Salk. 26.

The King and Buckall.

THIS was an Order of Bastardy made by two Justices, confirmed by an Order of Sessions. Mr. Strange took several Exceptions to it. In the first Place, he said, the Order appointed the Sum of 2 s. to be paid weekly, till the Child should come to the Age of twelve Years, without saying, if the Child shall be so long chargeable to the Parish. In the next Place it appoints, that the reputed Father shall pay 4 l. to the Overseers for the Binding the Child out Apprentice, when it shall come to the Age above-mentioned; and does not say, if the Child shall Want it; so that though the Child should be provided for in any other Way, the Sum must still be paid to the Overseers.

What shall
not be said
to be a good
Order of
Bastardy.

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He then observed, that the Order did not appear to be made upon Complaint of the Parish. And his last Exception was, that the reputed Father is ordered immediately to find Security for the obeying these Orders. Mr. Strange then took Notice, that there was another Order of Sessions, which appointed an Attachment to go against the Defendant for having disobeyed the first; and he submitted it, that the Court of Sessions have no Authority to issue such Process. Mr. Yates and Mr. Prime argued on the other Side. To the first Exception they said they must allow, that the old Authorities do lay it down in general, that Orders of Bastardy, as well as other Orders relating to the Poor, must be under the Limitation mentioned; but the later Authorities have been, that Orders of Bastardy need not; and this they said was founded upon good Reason; for there cannot be any reasonable Intendment, that Bastards who have no kind of Kindred, will have Provision from any Body, till such an Age as is mentioned in the Order. To this Purpose the Cases of *The King and Stoke, Hill. 2 Geo. 1.* and *The King and Street, Mich. 13 Geo. 1.* were cited in Point. The second Exception too, they said may have been allowed formerly; but in *1 Ven. 366.* it is expressly over-ruled by the Court. To the Third they said, the Statute of *18 Eliz. c. 3.* which this Order is founded upon, does not require that the Parish should complain, but gives the Justices Power to make such Order, upon the Complaint of any other. They observed too, that this Statute authorises the Justices to make what other Appointment they in their Discretions shall think meet; and this they thought gave an Answer to the last Exception. And as to what is said upon the last Order, they observed, that though the Word *Attachias* was in, that was to be understood no more than a common *Capias*; but admitting that it was, it is laid down in *Hawkins's Pleas of the Crown*, that every Court of Record may grant an Attachment. The Court said they were of the same Opinion as to the Answers to the three first Exceptions; but they thought the two last Exceptions good. Accordingly quashed the first Order as to the last Exception, and the last Order as to the Whole of it, and confirmed the first Order as to the rest. *Salk. 121, 122, 478, 480.*

Poulton and Heath ver. Farrar.

Vide 251.

MR. Reeves came now to discharge the Rule; and said that he did allow the Court has gone so far as to release Persons from Arrests, which they have been taken upon when attending the Business of their own Suits; but he did not know, they had done this in any Cases, but where the Application was fresh before putting in of Bail; whereas in the present Case the Defendant put in Bail directly, and by that has submitted to the Jurisdiction of the Court. The Court said in the present Case the Plaintiffs had a plain Design in taking Advantage of the Defendant's Attendance upon his former Suit, and a premeditated Schem in getting him here by the Letter one of them writ to him. Accordingly they thought the Attachment ought to go.

But

But upon the Plaintiffs agreeing, to deliver up the Bail-Bond, and pay the Costs, the Court only ordered the Attachment to lie in the Master's Hands. Salk. 544.

The King and Robe.

A Person was brought before the Defendant, a Justice of Peace, for Suspicion of Felony. He clearly acquitted himself of the Charge; and then insisted upon having Satisfaction of the Party, that made the Complaint. Upon which the Justice threatened to send him to Prison, if he would not take an Oath, not to bring any Action. And tendered an Oath to the other not to indict the Person accused. Both Parties took the Oaths accordingly. Complaint was made of this to the Court; and they granted an Information against the Justice; notwithstanding there was no Insinuation offered of this being done out of any other View, than merely to make Peace between the Parties; but the Court said, they would never suffer a Justice of Peace to compel a Person to take an Oath not to take Advantage of the Remedy, which the Law has given him.

How far the Court will grant an Information against a Justice of Peace for tendering an illegal Oath.

The King and The Lady Lawley.

AT the Sittings after last Term the Defendant was tried upon an Indictment for suborning a Witness not to appear at the Trial of one Japhet Croke. A great many Variances were then objected to have been between Croke's Indictment set forth upon Record in this Information, and Croke's Indictment given in Evidence. The Chief Justice did not chuse to determine then whether the Variances were material or not; but a Rule was entered into by Consent, that if a Verdict should be given against the Defendant upon the Merits, it should abide the Event of the Court's being of Opinion, whether or no the Objections were of Weight. Mr. Filmer moved this Morning, that the Rule might be enlarged till next Term; because by Mistake the Associate refused to deliver the Postea to the Prosecutor; and it could not be got out of his Hands till upon Application the Chief Justice ordered him to deliver it; so that the Defendant had not had Time to have a Copy of it. Mr. Kettleby on the other Side said, that this was in the Nature of a Motion for a new Trial, and that he said could not be; because the Defendant was not present in Court. Besides he observed, that this Motion ought to have been within the four first Days of the Term; though he did allow, that a Defendant might move in Arrest of Judgment at any Time before the Signing of it. The Court said, this was only a Motion to enlarge a Rule; and therefore it was not necessary for her to be here. And Judge Reynolds said in the Case of the Queen and Inchyn, Lord Lechmere indeavoured, when he was Counsel, to maintain the Distinction mentioned, but the Court there over-ruled it. However the Court said, that they would not enlarge the Rule, unless the Counsel would shew to the Court, that some of the Objections

What shall be said to be a good Indictment for Subornation of Perjury.

jections required Consideration. The Counsel then said, that one Objection was, that Croke's Indictment set forth upon Record was recited to have been found at Hicks's-Hall per duodecim Juratores; but upon the Evidence it appeared, that seventeen Persons were upon the Jury, & non constat, but all agreed to find it. Another Exception they took, was, that in the Indictment given in Evidence Croke was charged with having forged a Lease for a Pear, reserving a Pepper-Corn, si legitime demandat foret; but in the recital of the Indictment the Reservation is said to be, si legitime demandat fuisset. To the first of these Exceptions the Court said, that every Indictment founded by a Grand Jury is always said to be found by twelve, though more are concerned in the finding it. But the other, they thought, deserved more Consideration. Accordingly they enlarged the Rule till next Term; but ordered a Copy of all the Exceptions, the Defendant's Counsel intended to take, to be delivered to the other Side a Fortnight before the End of the Vacation.

Vide post.

The King and The Mayor and Aldermen, &c. of the Borough of Doncaster.

How far a Corporation cannot deprive a Person of an Office.

UPON a Return to a Mandamus to restore one Scot to the Office of Capital Burgess, the Defendants set forth, that the Borough of Doncaster was an antient Borough by Prescription, and that they were incorporated by several Charters from King Edward 4. and James 1. and that at last they received a new Charter from King Charles 2. in which their Name of Corporation was settled to be, the Mayor, Aldermen, Capital Burgesses, and the rest of the Burgesses of the said Corporation. They farther set forth, that by this Charter the Mayor, Aldermen and Capital Burgesses were appointed the Common Council of the Borough; and that a Power was given them to make whatever Ordinances or By-Laws they in their Discretion should think proper for the good Government of it. It was then set out in the Return, that the Charter appointed, that there should be three Chamberlains, each of them to continue for three Years, and that a new Chamberlain should be every Year successively chosen. That fit Persons were to be nominated by the Common Council out of the Capital Burgesses to stand Candidates for these Offices of Chamberlain; and that the Body at large were to elect which of them they thought proper for that Purpose. That the Office of Middle Chamberlain, was to take Care of the Revenue of the Corporation. They farther set forth, that Scot was a Capital Burgess and elected Chamberlain. That an Oath was administered to him, in pursuance of the Charter when he succeeded into the Trust of Middle Chamberlain, that he would serve the Corporation with Faithfulness. They then set forth, that the Capital Burgesses were appointed by the Charter to hold their Offices quam diu se bene gesserint, nisi debito modo fuerint amoti. They then return, that Scot behaved himself corruptly in his Office of Middle Chamberlain; that the Accounts he gave in to the Com-

mon

mon Council were false; and mention particular Instances of it. At last they set forth, that he was summoned particularly to answer these Offences; and upon his not giving a sufficient Answer to the Charges alledged against him, the Common Council removed him out of the Corporation. Mr. Bootle argued, that this Return was insufficient. He said in the first Place, that he did not think, that the Charge alledged against Scot was sufficient to remove him from his Office, as Chamberlain. It was true, he did admit, that Scot was guilty of a Breach of Trust; but not such a one, as amounted to a Violation of his Oath. He said therefore, that he willingly allowed, that Scot might be called to account in a Civil Action, or punishable perhaps in a Criminal Prosecution; but he submitted it, it was not sufficient to deprive him of his Office. He said, an Offence of that degree must be the destroying the publick Evidences of the Corporation; acting directly contrary to the common Interest of the Society; or some other publick Offence of the same Nature. These he thought were the Offences necessary to a Deprivation; unless others could be objected against Scot, as Violations of a positive Part of his Oath; but the Oath, he said, was only in general; and therefore nothing could be infer'd from that. And to this Purpose he relied upon one of the Resolutions in Bagg's Case. However, he said, in the next Place he should submit, that a Breach of Trust in his Office of Chamberlain could be no Reason to deprive him of his Office of Capital Burgess. But whatever might be the Opinion of the Court upon these particulars he relied upon one Thing, which would clearly prove the Return to be bad, and that was, that the Common Council have no Authority to deprive at all. There's no express Power given by the Charter to any Persons to remove. The only Authority of this Sort therefore must be given by the Law; the Body at large then must have it in themselves; or if the Electors were distinct from the Body at large, they perhaps in some Cases might claim it, where there is a general Power given them by the Charter to make what Regulations they think proper for the Government of the Body. Besides, he said, the Body at large have no right to deprive a Person from his Office, till he is legally convicted of an Offence, unless they have a Power of this Sort given them by Charter or Prescription. And this, he said, was another Resolution in Bagg's Case, founded upon Magna Charta. And the Judges have always had so sacred a Regard to it; that in Stiles 477. Rolls and Glyn, both Chief Justices, held a Return of this Sort to be insufficient, though it was set forth in it, that from Time to Time the Officers in the Corporation had been removeable. To the first of these Points the Court were of Opinion, that the Offence was sufficient to remove Scot from the Office of Chamberlain; as it was no collateral Matter, but what directly concerned the Office itself. To the second, they thought, it could not effect him in his Office of Capital Burgess; and this, though it had been a direct Breach of his Oath as Chamberlain. To the last, they said, the Common Council had no Authority to remove; though if they had been the sole Electors of Scot, they did allow, there

might have been a Foundation for there doing it from the general Authority given them of making Ordinances for the good of the Body. Accordingly granted a peremptory Mandamus.

The King and Woolston.

Vide 161.

THE Attorney General now demanding Judgment against the Defendant, Mr. Worley strongly urg'd, that he might be allow'd to lay before the Court the Arguments he had prepar'd, to induce them to be of Opinion, that this was but a small Offence to Society in general, admitting it to be any at all. And this, he hop'd, was the proper time to lay these Matters before the Court, to induce them to impose a moderate Punishment upon the Prisoner. But the Court said, that where indeed the Nature and Circumstances of an Offence are not particularly set forth upon Record, they do allow the Defendant to go out of the Record, to set forth the Nature and Circumstances of it; and therefore when Judgment is demanded upon an Indictment of Battery, the Defendant's Council is constantly admitted to lay before the Court Affidavits concerning the Nature of it, or else to apply for the Judge's Report. But wherever the Nature and Circumstances of the Offence entirely appear upon the Record, the Court never suffers the Council of either side to harangue upon the Crime; but the Court is to judge upon it as it stands upon Record, and according to their Judgment upon it, the Sentence is to be pronounc'd. This, they said, is the constant Case of every Libel. The present Case was exactly the same with that. And therefore the Court directly pronounc'd Sentence, that upon the three first Informations for the three first Books, the Defendants should be fin'd 25 l. a-piece; for the last he should likewise pay the Sum of 25 l. and for that should lie in Prison a Year from henceforth; and then to continue in Prison for Life, unless he himself should be bound in a Recognizance of 2000 l. and two others in the Sum of 1000 l. each, or four in the Sum of 500 l. each, with Condition for his good Behaviour during Life.

The King and The Inhabitants of Risley.

Vide 126.

MR. Clark came now to New Cause, and cited a Case in Comberbatch 266 in point. But Mr. Prime answer'd, that the later Cases have all gone the other way; and particularly rely'd upon several in Salk. 481, 488, 489. the Court accordingly declar'd themselves to be of that Opinion. Upon which Mr. Clark then took an Exception to the original Order, that it was for the removal of a Man and his Wife, and a Boy and a Girl. Now, he said, it does not appear, that these were the Children of the Man and the Wife. Mr. Prime said, that he believ'd that Exception could not be got over; however that would only make the Order bad as to the Children. Accordingly the Court confirm'd it as to the Man and his Wife, and quash'd it as to the Children. Salk. 123.

Assignees of a Commission of Bankruptcy against Lopes
Alardes, Plaintiff, *ver.* Fenton, Defendant.

Guildhall. **A** Sumpsit was brought against the Defendant for 100 l. which he had received of the Bankrupt's Money. Upon the Evidence for the Defendant it appear'd, that 84 l. part of it was given by Alardes to the Defendant, a Month before he became a Bankrupt, to be bail for him in all Actions; and this Defendant was an Officer in the Poultry-Compter. The remaining 16 l. was given to the Defendant likewise about the same time to pay Alardes's Attorney what should be due to him for Law-charges. The Defendant accordingly paid the Attorney his Bill, which came to eight Guineas, before Alardes became a Bankrupt; the 7 l. 12 s. remaining, was paid by the Defendant for several things belonging to the Suit, as putting in bail, &c. after the Act of Bankruptcy. Mr. Reeves objected for the Plaintiffs, that there was an Order made by the Common-Council of the City of London, that no Officer of either of the Compters should be bail for any Person; and therefore that the 84 l. given to the Defendant, was upon a void Consideration. Besides he observ'd, this could have been given with no other Design but to defraud or delay the Creditors; and that was likewise another illegal Consideration. And Mr. Fazakerly urg'd, that this Act amounted very near to an Act of Bankruptcy itself, within the Meaning of the Stat. of 21 Ja. 1. 19. And they both insisted, that the Payment of the 7 l. 12 s. was void; as being for the Benefit of the Bankrupt after the Act of Bankruptcy committed. The Chief Justice said, that there was a standing Order of the Court too, that no Attorney should be bail in any Case; but the Practice has constantly been to admit Officers of the Compters, and Attornies too to be bail for People notwithstanding. To the second Point he was of Opinion, that the Consideration was not fraudulent. But the last Objection he said was fatal. Accordingly the Jury found a Verdict for the Plaintiff, and Damages 7 l. 12 s.

How far a Consideration of a Promise shall not be said to be illegal.

Roberts and Mountford.

Guildhall. **T**HIS was an Action brought against the Defendant as Administratrix to one Mountfourtney; and several Counts were in the Declaration; one, wherein Mountfourtney was charg'd as principal Debtor; another, wherein he was charg'd as Security for another. Upon the Evidence, a Letter was produc'd under Mountfourtney's Hand, by which he certainly charg'd himself in one of the ways; but this Promise was to pay the Money at Lisbon within a Year; whereas the Declaration was to pay the Money generally. Upon this Mr. Fazakerly objected, that here was a material Variance; and the Promise as laid in the Declaration was much more to Mountfourtney's Disadvantage, than that appearing upon the Evidence. He said, as it is said, the Defendant could not have pleaded a Tender

When an Action is brought upon a Promissory Note, how far the Evidence shall be said to maintain the Declaration.

Tender at Lisbon, without pleading at the same time a Tender to the Person of the Plaintiff; but if the Promise had been set out justly, a Tender at the most notorious Place would have been sufficient. Besides, the Defendant might have agreed to pay a less Sum at any other Place in Satisfaction; but as the Promise is laid he could not. And he took Notice likewise, that the Difference of the Exchange of Money is often very considerable. Mr. Reeves's Answer to this Objection was, that the Plaintiff had declar'd generally upon the Promise, and not specially upon the Note; and therefore he readily admitted, that this Objection would have been fatal, if the Note had been declar'd upon; for the Note must be set out, as it really is; but in the present Case, he hop'd, the Objection was not material. The Chief Justice too was of Opinion, that it was not; but he gave another Reason, because the Promise was to indemnify the Plaintiff in trusting a third Person; now he observ'd, that the Plaintiff was already dammified; and therefore the Action was only brought to repair the Plaintiff in Damages. Now that, he said, need not be laid with so much certainty, as where the Action is to recover the thing itself. Therefore he thought, the Declaration was good enough; and if there had been any of those things, which the Defendant's Council had objected might have been, he ought to have set forth the Promise as in Truth it was; and then to be sure he would have had the Benefit of them. A Verdict was accordingly found for the Plaintiff. The Council then doubted a little, which Count they should take the Verdict upon. The Court said, they could not take it upon any Count in particular, unless the Evidence went to it. But at last the Council said, they would take the Verdict generally. Salk. 133.

Patterson and Col. St. Clair.

How far the Deposition of a Witness may be read, by reason that the Witness himself is in Scotland. **GUILDHALL.** IN an Action upon a South-Sea Contract two Issues were directed to be try'd out of Chancery. The Defendant had deny'd the Contract in his Answer; and the Design of these Issues was to try, whether his Answer was true or not. A Deposition was offer'd now to be read, but Mr. Marsh objected to it, that the Witness ought to have given his Testimony upon Oath in Person. Mr. Reeves then produced another Witness, who swore that the first was in Scotland. And upon that the Court allow'd the Deposition to be read.

Way and Nickson.

How far an Action will not lie against a Person for commencing a former Action against him without any Reason. **GUILDHALL.** THIS was an Action brought against the Defendant for having commenc'd a former Action against the present Plaintiff, wherein he was nonsuited; and this without any probable Cause. The Declaration laid, that the present Defendant commenc'd his former Action in order to distress the present Plaintiff, that he laid his Cause of Action to 36l. with a Design to hinder his Friends from being bail for him; per

per quod his Friends refus'd to be bail for him, by Means of which he lay in Prison for seven Months. The former Action was brought for 36l. for Goods sold and delivered to the present Plaintiff upon his own Credit; tho' they were bought for the Benefit of his Master. And now two Witnesses swore positively, that the present Plaintiff did buy them purely upon his own Credit. But Mr. Reeves objected for the Defendant that the Action would not lie. He said it was most known and certain Law, that tho' a Person commences an Action against another without any probable Reason, merely thro' Malice to distress him, no Action will lie for such Injury done, unless it be attended with particular Damage to the Party. The Satisfaction appointed by the Law is a Recompence by Costs of Suit. The only Colour therefore for the Plaintiffs commencing this present Action, arises from the Damage he suffer'd by his Imprisonment. But that, he said, was not to be attributed to the present Defendant, but to the Plaintiff's Misfortune of wanting Friends. He said, if the Plaintiff in the former Action had held the Defendant to bail in a Sum vastly exceeding the Debt in demand, he must have allow'd, he would have been answerable for it in a separate Action; but the Sum, in which the former Defendant was held to bail in, did not exceed one Farthing the Sum now prov'd to be due, from the Master at least, if not from the Servant. He said the Sum now prov'd; for the present Defendant had not an Opportunity to prove it upon the former Trial; an Agreement being propos'd and almost entred into before the Trial came on, and upon that the now Defendant sent away his Witnesses then. The Chief Justice he did allow, did order the Trial to come on notwithstanding; because the present Plaintiff was then in Custody; and upon that the now Defendant was nonsuited. So that, he said, the present Plaintiff was not acquitted upon a full hearing of the Evidence on both Sides; but upon a Nonsuit; a Nonsuit too, the least blameable; not arising from any Negligence or Defect in the Proceedings, but from a mere Surprise. The Chief Justice said, that he was of Opinion, that the Imprisonment which the Plaintiff lay under in the former Action, was the Gift of present one; and he thought a just Foundation of it. He said too, he should have been of this same Opinion, tho' the Declaration had not laid, that the former Action was brought out of any Ill-will, to give the Plaintiff distress. Accordingly he directed the Jury to find for the Plaintiff, if they believ'd the two Witnesses swore false; but if they believ'd they swore true, to find for the Defendant. Upon which the Jury went out, and then brought in a Verdict for the Plaintiff to 30l. Salk. 14, 174.

Watlington and Wilkinson, & al'.

Watlington and Brand.

How far the
Statute of
Limitations
is a good
Plea to a Bill
in a Court
of Equity.

Canc. **T**HESE were two Causes, wherein the Defendants were charged with carrying on a Fraud in 1720. by drawing People into a Bubble, called the Orkney-Fishery. The Bills were brought to have a Discovery of this Fraud, and the Money refunded. The Defendants in the first Cause pleaded the Statute of Limitations in Bar to the Discovery; and by Way of Answer, set forth in particular, that there was no Fraud. The Defendant in the second Cause set forth, that he was only Cashier to the Proprietors, and barely as to that Part of the Bill, which required him to refund the Money the Adventurers had put into his Hands, pleaded the Statute of Limitations; and denied that he knew any Thing of Fraud or that he was one of the Managers; and for Answer said, that he was willing to make a Discovery of any Thing he knew, and ready to account, if the Court should be of Opinion, that he ought to do so. The Solicitor General was Counsel for the Defendants in the first Cause, and urged, that it was most known and certain, that if there had been no Fraud suggested in the Bill, the Plaintiffs could not come into a Court of Equity and pray Relief, when they had stayed too late for having any in the Courts of Law. And as to the Foundation of Fraud, it was discovered from the very first, and there was equal Reason, that a Complaint of this Sort should be confined to be made within the Time limited by the Statute, as any other. And this, he said, was clearly allowed in Lord Warrington's Case, that was lately before the House of Lords and the Judges required to attend in it. But the great Debate in that Case was, if a Fraud should happen to be detected after six Years, whether the Party was too late to apply for Relief. The House of Lords were indeed of Opinion, that the Party was not too late in that Case; but the Difficulty they had upon them in getting over that Point, was a full Argument, that they well were satisfied, that he would be too late in the other. Lord Chancellor said, that this was a Matter which well deserved some Consideration; but thought clearly, that this Plea could not be a Bar to the Plaintiff's requiring a Discovery of the Fraud; and then indeed it might be proper to consider whether the Plaintiff knew of it so soon, as to have been obliged to have brought his Bill before. Accordingly his Lordship ordered, that the Plea should stand for an Answer with Liberty to except. However to the Plea of the Defendant in the second Cause, the Attorney General said, that he hoped it should be directly allowed for a Bar. He said, it was not pleaded in Bar of a Discovery, but merely to the refunding the Money to the Adventurers, upon account of the Defendant's being only a common Cashier or Banker to the Proprietors, without knowing any thing of a Fraud in the Design. This, he

said,

said, was expressly sworn by the Answer. The Court said, that if this was Truth, most certainly the Plea would be good; but however it would be proper to be fully considered of upon the Hearing; and accordingly ordered this Plea likewise to stand for an Answer, &c. Salk. 424.

Vaughan *ver.* Guy & al'.

Chancellor's House. **T**HE Plaintiff brought his Bill against the Defendants as Executors of one Webster, partly for Money received to his Use, partly for Business done as an Attorney, and set forth in that the Will directed the Executors to pay this Money. Neither of the Defendants put in any Answer; and Guy only pleaded in Bar the Statute of Limitations. The Solicitor General and Mr. Lutwyche argued for the Defendants, that though Part of the six Years run in the Time of the Testator and Part in the Time of the Executors, that could be no Objection to the Plaintiff's being bound by this Statute. The only Matter the Plaintiff relies upon to distinguish his from the ordinary Case is, that the Will has directed the Testator's Debts to be paid, that this is a Debt as well as any other; and in this Case especially it must have been his Meaning, that it should have been paid, because at the Time the Testator died the Debts could not have been barred. But the Counsel urged, it was true indeed, where a Will directs, that Lands should be sold for the Payment of a Man's Debts, these Debts as well as any other, shall have the Benefit of the Sale; but in the present Case the Direction to the Executors is in nothing particular, and differs in no respect from what the Law would imply without it. And the Solicitor said, the Argument, which is drawn for the Plaintiff from the Testator's dying before the Time was out for the Payment of the Debt, and the Inference made use of from this, that he must have designed this Debt should have been paid, as well as the rest, directly turns the other Way; because it cannot be supposed in this Case, that he had any Thing particular in his Thoughts. But if the Testator had lived beyond the Time when this Debt was demandable, a favourable Argument might have been drawn for the Plaintiff, that the Testator's intent was to provide in this Way for the Payment. Mr. Lutwyche observed too, that formerly it has been made a doubt of, whether Attornies and Solicitors are bound to bring their Actions for their Fees within the Time limited by the Statute for ordinary Cases, because their Demand appears upon Record; but this Matter has often been over-ruled since; and the Chancellor said, it was so by Lord Chief Justice Holt. Mr. Lutwyche concluded by saying, that the principal Point in the present Case had been expressly determined by the Master of the Rolls, and confirmed by Lord Macclesfield. The Chancellor said, that however proper the Substance of the Plea might be, the Defendants could have no Benefit of it as it is

When a Bill is brought against two Executors, how far a Plea of one of them cannot be allowed of.

is pleaded; because it is a Plea of one of the Executors only, and the other has not so much as put in his Answer. Executors indeed may sever in pleading, but both must say something. And this, he said, was a settled Rule in Law and Equity, unless upon the Statute of 9 Edward 3. where it is provided, that if one Executor does not appear upon the Grand Discreet, Judgment shall pass however upon the Plea of the other. According the Plea was over-ruled with Liberty to have the Benefit of the Statute of the Limitations upon the Hearing of the Cause. Salk. 154. 1 Mod. 246. 3 Mod. 243. Salk. 278, 312.

Bourke and Bridgeman.

How far a
Plea of a
Stated Ac-
count shall
be good in
a Court of
Equity.

Chancellor's House. **T**HE Plaintiff brought his Bill to have an Account of such Part of the Personal Estate of one Alexander Dempster, as was not comprised in a Stated Account. The Defendant pleaded the Stated Account in Bar. The Attorney General defended the Plea. He said, the Account was agreed to be made of all Matters concerning this Personal Estate, which the Parties mutually claimed a Right to by the Statute of Distributions; accordingly the Account was made up and settled; and yet the Plaintiff would now come and demand a Discovery of particular Items supposed not to be comprised in it, but still at the same Time allow the Account to be rightly taken. He observed, that this was contrary to the common Notion of Proceeding. Either the Items must be denied in particular by falsifying them, or saying they were not allowed, or else a Surcharge must be brought in. But in the present Case neither of these Ways is taken; so that the Plaintiff would unravel the Account without pointing out one Error in it. Accordingly the Chancellor said this must not be suffered, and therefore the Plea was allowed. . 1 Vern. 179, 180.

Heaton and Hugell.

How far a
Person shall
not be allow-
ed to redeem
a Mortgage
by Reason of
the length of
Time.

Chancellor's House. **T**HE Plaintiff brought his Bill to have the Benefit of an Equity of Redemption of a Mortgage, which was made in 1699, and upon which the Defendant entered and took Possession in 1703. The Defendant pleaded his Continuance in Possession for 23 Years, and hoped therefore that the Bill should be dismissed, which was brought in 1726. The Chancellor said, a Statute has provided, that no Person shall bring an Ejectment after having been out of Possession 20 Years, and unless the Circumstances are particular he thought that a good Rule to guide this Court in Redemption of Mortgages; so the Plea was allowed. 2 Vern. 377, 419.

Term. Hill.

3 Geo. II. 1729.

The King *and* The Duke of Bedford and others.

MR. Hussey moved to have Inspection of the Publick Vide 242. Books of the Corporation of Bedford Level. The Court said, at present the Time was not out for making the Rule absolute for granting the Information; and that it did not therefore as yet appear but the Prosecutor might be a common Informer, who had a Mind only to unravel the Secrets of the Corporation; and upon that Account they refused to grant this Motion in Behalf of the Prosecutor, till there should be some Evidence laid before them, that the Parties prosecuting were interested in the Corporation. The next Day **M**r. Hussey produced the Affidavits, which the Original Rule was made upon for granting the Quo Warranto; and by them it did appear, that the Parties prosecuting were Parties in Interest. He cited two several Precedents, where the Court had granted Rules of this Nature on Behalf of such Prosecutors before the Original Rule made absolute; and particularly he mentioned those of The King and Hughes, and Appleby's Case. The Court accordingly granted the Motion.

Jones *and* Newbank.

MR. Kettleby now produced an Affidavit, that they had de- Vide 252. manded the Plaintiff's Place of Abode of the Attorney, and likewise the Costs of the former Notice of Trial; but that the Attorney had denied to comply with either of the Requests; upon which he moved, that either the Attorney might pay the Costs of the former Notice of Trial, or Proceedings might be said. Judge Reynolds said that he thought the proper Motion was, that Service upon the Attorney might be good Service. And accordingly the Court made that Rule.

When Debt
is brought
upon a Re-
cognizance
against Bail
after a Writ
of Error is
brought up-
on the Prin-
cipal Judg-
ment, upon
what Terms
the Court
will stay Pro-
ceedings in
such Action.

Williams and Elms.

DEBT upon a Recognizance of Bail was brought after Writ of Error allowed upon the Principal Judgment. Mr. Marsh said, that it was true the Writ of Error was no Superedeas in this Action; but yet in the Case of Arthur and Myonnet, the Court stayed the Proceedings against the Bail upon their entering into a Rule to surrender the Principal in four Days after Affirmance of the Judgment, or pay the Condemnation-money. And therefore he prayed the like Rule in this Case, which the Court granted.

The King and The Lady Lawley.

Vide 263.

Serjeant Eyres moved now for a new Trial upon account of the Variances. The other Side insisted, that the Defendant ought to be here in Person. But to that he answered, that these Variances were insisted upon at the Trial, that the Counsel for the Defendant would then have desired a Special Verdict, but the Chief Justice proposed, that if the Jury should convict the Defendant upon the Merits, he should still have Liberty of taking Advantage of the Variances upon Motion. he said therefore, that they ought not in this Way to lose any Advantage, which they would have had a Right to, if the Verdict had been special; and if it had been so, no doubt of it the Defendant would not have been obliged to appear in Person; and so was the Case of The King and Hayes. The Court said, that was certainly true; but the Chief Justice observed, that no Mention was made at the Trial of a Special Verdict. And they all agreed, that it was a general Rule, that wherever a Defendant is convicted of an Offence, for which, if he was present at the Time of the Conviction, they would commit him, in all such Cases the Court requires his being present, if he would move for a new Trial or take Advantage of any Exception. And Judge Reynolds said, he remembered a Case, where a Person was committed, even upon a Conviction for a Libel. Accordingly the Court refused the Motion at present.

Robinson and Noble.

How far a
Citizen of
London can-
not employ a
Foreigner to
work in his
Business.

Vide post

MR. Common Serjeant moved for a Procedendo in an Action of Debt upon a By-Law of the City of London, which restrains Citizens from setting Foreigners at work after Notice. He said this By-Law has already been allowed in two Cases; one in that of Player and Pettie, Sid. 269. the other in that of Robinson and Parker last Term in the Common Pleas. Accordingly the Court made a Rule to shew Cause.

Castel

Castel and Bambridge.

THE Trial in this Case was to come on at the Sittings on Monday next. *Vide 247.* Mr. Kettleby and Mr. Strange moved for a Rule upon Mr. Tanner, an Officer at the Old Baily, to attend at the Trial with the Inquest and the other Proceedings taken by the Coroner, when he sat upon the Body of the Appellant's Husband. A Copy of the Indictment, they said, they had no right to, as the Charge was a Charge of Murder; and therefore, unless they could obtain the Rule they prayed for, they did not know, what Remedy they could have. In other Cases the Party has the Benefit of Records by taking Copies of them; and where Copies of Records are suggested to be made up wrong upon Writs of Error out of the Common Pleas, the Court orders the Officer to attend in Person with them. The Judges too of this Court, they said, were always in Commission at the Old Baily; and that they thought a farther Reason, why the Court might particularly grant the Motion in the present Case. The Court said, the Attorney General no doubt of it, might let them have the Benefit of the Proceedings before the Coroner; but they did not see how this Court had any Thing to do with an Officer at the Old Baily. And as to the Instance mentioned of the Officer of the Common Pleas, the Court said, the Reason for that was, that there is a supposed Contempt in disobeying the Writ directed to him to certify the Record below. The Defendant's Counsel then prayed, that a Rule might be made upon Mr. Cotton, the Clerk of the Papers to attend with the publick Books of the Fleet-Prison. They said they doubted, the Common Pleas would not assist them with such a Rule, as the Cause was in this Court. The Court said, they did not think Gaoler's Books were publick ones; but if any Rule of this Sort could be made, they thought the Common Pleas was the properest Court to make it in. In an Action for Fees, this Court would not make such a Rule, tho' the Common Pleas might. At last the Counsel moved for a Rule upon Mr. Clark to attend with the Writ of Appeal. But the Court said, by Law they had a Right to have a Copy of it; so that Part of the Motion *Vide post* was refused likewise.

The King and Gohaire.

IN an Information filed in the Attorney General's Name, for Beating a Custom-house Officer, the Prosecutor had given Notice of Trial, but not countermanded it, till the Defendant had retained his Counsel, and was ready to attend; upon which Mr. Kettleby moved for Costs. But Mr. Masterman informed the Court, that in Informations of this Nature, where the King's Name is more than barely made use of, the Crown never receives nor pays Costs. Accordingly the Court refused the Motion. *When an Information is brought, how far the Prosecutor shall not pay Costs.*

Pyle

Pyle and Grant.

Vide 255,
260.

THIS was the Day appointed for the Trial at the Bar; and accordingly Serjeant Chappel moved for the Defendant, that the Appellant might be called. He said that he had Affidavits to produce, that the Appellant had not all this while so much as demanded the Freeholder's Book of the Under-Sheriff or his Agent above; and yet a Trial at Bar was expressly appointed for to Day. Mr. Fortescue on the other Side said, that they had an Affidavit to produce, that they had demanded them of the late High Sheriff, but that he refused to give them, because he was just going out of his Office; that they had demanded them likewise of the present High Sheriff; but that he refused to deliver them, because he was not sworn into his Office. Therefore he prayed, that there might be a farther Day given to the Parties to appear. The Court said, that the Appellant is by Law demandable on every Day that is given him to appear by Writ or by the Roll; but that they could not record the Nonsuit, because the Venire was not produced, nor the Roll in Court. They said, there might be Reason to think, that the Entries were not properly made up upon the Roll no more than a proper Care taken to prepare for Trial; and therefore they made a Rule, that no Entries of this Sort should be supplied. They said likewise, that at present there was sufficient Reason to bail the Defendant for the affected Delay; and accordingly took his own Recognisance in 500 l. on the Civil Side to the Appellant himself to appear on the last Day of the Term.

Blunket and Freeman.

How far an
Elegit may
be amended.

MR. Kettleby came to shew Cause, why an Elegit should not be amended, which recited the Judgment to be Georgii nuper Regis, whereas it should be anno Regni nostri. He said, that whatever Power the Court might have of amending Writs of Execution, yet he hoped the Court would not do it, as this Case was circumstanced, because the Defendant had not only got Possession upon the Elegit, but had actually brought an Execment. Mr. Strange said, that that was the very Reason, why they wanted the Amendment; because as this Writ was, they could not maintain their Execment. Accordingly the Court made the Rule absolute; because there was the very Judgment produced, which warranted the Amendment.

Myonet and Broom.

How far a
Defendant
shall not be
allowed
to make a
Waiver in
Prejudice of
his Bail.

MR. Reeves moved to stay Proceedings against Bail, for there having been a Non pros' waived in the original Action to the Prejudice of the present Defendant. The Court said, if the Non pros' was irregular, the Bail was bound by the Waiver; because the Party only did that voluntarily, which the

the Court would have compelled him to have done; but if the Non pros was regular, there was an End of the Action as to the Bail; and consequently the Agreement of the Parties could not continue it as to them. Upon which the Court made a Rule to shew Cause. Vide post

The King and Munroe.

MR. Yates moved to quash an Indictment for exercising the Trade of a Baker, the Defendant not having served a legal Apprenticeship. The Exception he took to it was, that the Trade was not laid to be used *infra Regnum Angliæ* at the Time of the Aa. The Court said, the Trade of a Baker was within the Words of the Aa; and no Averment of the Trade's being used at the Time of the Aa is necessary, but where the Trade only falls within the general Conclusion of the Clause at last. What shall be said to be a good Indictment for exercising a Trade without having served an Apprenticeship.

Hatton and Hatton.

MR. Strange moved for a Prohibition to be directed to the Prerogative Court of the Archbishop of Canterbury, for their holding Plea there upon a Libel against an Executor for Distribution; and cited the Case of Petit and Smith. J. Reynolds said, Bills of this Sort were allowed in Chancery; but the Court granted a Rule to shew Cause. How far a Suit will not lie in the Ecclesiastical Court for a Distribution of an Intestate's Estate. Vide post

Holt and Ward.

MR. Birch moved to plead double, Infancy in the Plaintiff and Non Assumpsit. He said, as this Case was Infancy in the Promisee would make the Promise without Remedy, as much as Infancy in the Promisor; because the Consideration of the Defendant's being bound by his Promise of Marriage to the Plaintiff, was, that the Plaintiff was bound by her Promise of Marriage to the Defendant. The Court said, it might be proper to be considered of, how far the Plea was good. But granted the Motion. Vide ante 247.

Way and Nickson.

MR. Reeves moved for a new Trial, for the Verdict's being against Evidence. He said, that there were two Witnesses, that swore directly for the Defendant, that he had a good Cause of Action in the former Suit against the Plaintiff; and that was enough to make that Suit not frivolous nor veratious; whether the Witnesses swore false or not. The Jury indeed are Judges of the Fact, whether the Witnesses did swear false; but the Court are Judges of the Law; whether, admitting they did so, the Action is malicious. The Chief Justice reported the Fact to be so; and he and the Rest of the Court agreed, that Vide ante 268.

the first Action could not be said to be malicious; and accordingly the Court granted a new Trial.

The King and Saunders.

When an Indictment is found at the Sessions, What shall not be said to be a good Caption of such Indictment.

Motion was made to quash an Indictment, try'd at the Quarter-Sessions, for the Caption's being wrong; it being ad generalem Quarterialem Sessionem Pacis, without saying per adjournamentum. The Case of the King and Walker was cited, which was an Order of Sessions; and there this Exception was allow'd. The Court said, in Orders of Removal, no doubt of it this Exception is fatal; because the Statute requires, that the Order should be adjourn'd by Appeal to next Quarter-Sessions. But they did not think, this same Thing was necessary to be said in Indictments. However upon Mr. Abney's saying (who was not concern'd in the Cause) that he did not know, but the Statute of Hen. V. which appoints Quarter-Sessions, might by Construction require, that they should be kept on by Adjournment from one to the other; the Court said, the Caption would certainly have been good, if it had been ad generalem Sessionem generally; but as it was, they would consider of it; and accordingly made a Rule to shew Cause.

Townsend and Brown and others.

What shall be said to be a waiver of special Bail.

MR. Lee came to shew Cause upon a Rule, why Proceedings upon a Bail-Bond should not be staid in two Actions. The first he said was a joint Action, wherein three were Defendants, who were Partners in Trade. In that the Plaintiff had taken an Assignment of the Bail-Bond, because only Brown had given special Bail, and the others had not appear'd. The second Action was against two of the same Defendants, and an Assignment of the Bail-Bond was taken in that likewise, for want of Bail's being given above at all. But Mr. Fazakerley on the other side said, that in the first Action the Proceedings were intirely irregular, because all the Defendants had not appear'd, and the Suit was by Bill; and it is a certain Rule, that a Party must be in Custodia Mareschalli, before he can be declar'd against in that Way. Indeed where the Proceeding is by Original, some of the Defendants may be proceeded against by Outlawry; and when they are outlaw'd, the Proceedings are regular against the other upon the original Action. So that, he said, the Delivery of the Declaration to Brown's Attorney in the Name of all the Defendants, must be intirely ineffedual as to carrying on the Proceedings in the Cause; but yet that it must be a waiver of Bail above being to be put in; for it actually supposes it to have been done already. Then as to the second Action Mr. Fazakerley said, that the two Defendants were Bankrupts at the Time that Bail was given to the Sheriff; that the Plaintiff had actually come in as a Creditor under the Commission; and therefore the Court would not suffer him to take his Remedy at the same Time against the Bail. The Court accordingly

accordingly made the Rule absolute in the first Action, and said, that special Bail was clearly waiv'd; but yet that they should consider the Acceptance of the Declaration by Brown's Attorney so far an Agreement to appear for all the Defendants, as to make him find common Bail accordingly. But as to the second Action, they thought the Affidavit was not positive enough as to the Fact; so enlarg'd the Rule for a Day or two.

Anonymus.

MR. Fenwick mov'd for an Information in the Nature of a Quo Warranto against one Watkinson, for taking upon him the Office of Petit-Constable, and against several others for choosing him. He said, a Matter of Right was in dispute; the Inhabitants of the Town claiming this Privilege of nominating Constables, as of common Right; Lord Molineux, as Lord of the Manor. But the Court said, no doubt of it, the King has a Right to call any one to Account by his Writ of Quo-Warranto, for exercising any Publick-Office, be it ever so small; yet we don't use to grant Informations in the Nature of them for such inferior Offices. And Judge Page said, that he did not know, the Court had ever gone so far as to grant them against High-Constables. They said however, they would grant a Mandamus to swear in the Person nominated on a proper Affidavit. And accordingly M^r. Fenwick said, he would get such a one.

How far the Court will not grant an Information in Nature of a Quo-Warranto, for exercising an Office by reason of the smallness of the Office.

Hornby and Cornford.

THE last time this Matter came on a Rule was made by Consent, that the Defendant should bring into Court what Sum the Matter should appoint, and that all Proceedings should stay. M^r. Draper produc'd now an Affidavit, that the Defendant had been serv'd with the Rule of Court, and Appointment of the Matter to bring 54 l. into Court, but had neglected to bring in any Money at all; and therefore he mov'd, that the Plaintiff might be at Liberty to sign his Judgment. But the Court said, at present they were not so clear of Opinion for the Plaintiff, and therefore could not give Judgment without hearing the Matter again. The direct way they said, was to enforce the Rule by Attachment; but that they could not do neither without Affidavit of personal Service.

Vide ante 175.

Brown and Kendal.

IN an Action of Covenant, wherein there were two Counts, one for Rent, the other for Repairs, M^r. Draper mov'd to bring the last three Quarters Rent into Court, and that Proceedings might be staid upon that Count. He said, that more Rent indeed was due, but not from the Defendant; for he was only Assignee from that time; and cited the Case of Risley and Jones,

How far the Court will stay Proceedings in an Action on bringing into Court what's bona fide due.

Jones, Pas. 9. of the late Queen, where the same Rule was made. The Court would not make that Rule; but upon Debate they made another, that upon bringing into Court what Rent was demanded, it should be refer'd to the Master to see what was due by the Defendant, and that upon payment of that with Costs, all Proceedings should be said upon that Count.

Justice and Jones.

How far a Mandamus will lie to the Ecclesiastical Court to grant Probate of a Will.

MR. Reeves and Mr. Lee mov'd for a Mandamus to be directed to Dr. Bettelworth, Judge of the Prerogative Court of Canterbury, to grant a Probate of the Will of Lord Londonderry, upon an Affidavit, that the Judge had refused to grant it, till there should be a Commission of Appraisement executed. A Case in Raymond, 235, was cited, where the like Motion was granted. Accordingly the Court granted it in the present Case, without making a Rule to shew Cause for the Inconvenience of a Delay in a Matter of this Nature.

The King and the Duke of Bedford and others.

Vide ante 242.

THE Defendants came now to shew Cause, why the Rule should not be made absolute for the Information. Mr. Lee said, that the granting of these Informations in the Nature of Quo Warrantos, was discretionary in the Court, as well as the granting of any other. In the Case of The King and Grant, an Information was mov'd for against an Officer of a Corporation, for not having renounc'd the solemn League and Covenant, and refus'd by the Court, because 'twas after some length of Time. For the same Reason another Information of the like Nature was refus'd in the Case of the King and the Town of Bridgwater, where an Officer had omitted taking the Oaths in a proper Time; so that, he said, the Circumstances of the Case will be the Guide to the Court's Direction. The Complaint against the Duke was, that after he was elected Governor, the Oath of Office was administered to him in an illegal Manner, and yet under that Oath he presided, and acted as Governor. His Election was in the Fen-Office, as the Statute requires; but his Oath was administered to him in Brown's Coffee-House in Mitre-Court. The Statute requires, that the six Bailiffs, or one of them, shall administer it; but instead of their doing it, when the Duke required it of him, they all endeavour'd to get out of the Room, as soon as he appear'd, but the Door was shut against them; and yet the Register took upon himself to administer it. As soon as the Duke was thus sworn in, he went back into the Fen-Office, and there the Assembly proceeded to choose the other Defendants as his new Bailiffs, the Duke presiding as Governor. The Council clearly allow'd, that the Validity of this Oath must determine the Election of the Bailiffs as well as the Governor's; because the Act requires, that the Governor, or one of the Bailiffs shall be present. None of the Bailiffs were agreed on both sides,

and

and the Governoz is incapable of ading, till he is duly sworn. But they insisted, that the manner of administering the Oath, was in itself but Form only, required by the Act; and its being administered before the Bailiffs, was in Substance the same as being administered by them. The Bailiffs too had Notice given them to be at the Pen-Office, that being the most proper Place to have had the Oath administered in; but that Place is not required by the Act for this Purpose, and consequently the Exception as to the Place cannot be material. The Council urg'd too, that an Objection of this sort comes very improperly from the Bailiffs, because the Statute requires them to be present to administer the Oath, they are bound to do this by their own Oath they take themselves, when they enter into their Office; and yet at this Time voluntarily absented themselves. Another Objection, they said, has been made, that the Duke was an Infant when he was elected. But this, 'twas answer'd, would have little weight with the Court, because 1. Cro. 557. 'tis expressly held, that an Infant may be a Mayor. Members of both Houses of Parliament might have been so at Common-Law. And the Reason for these Cases is, that Officers of this Sort are only in Trust, and by the Appointment of others, and 'twas their Folly to choose them. They urg'd besides, that the present Corporation was only appointed for the Preservation of a Tract of Ground, a Matter of private Property, wherein the Exercise of Justice, or the Protection of the Publick Peace of the Kingdom was not concern'd; and that was a Reason why, they said, it was to be doubted, whether even a Quo Warranto would lie. In the Case of a Warrener or a Steward of a Court-Baron it does not. The first was the Case of Sir William Lowther; the other concerning the Mayor of Holton in Lancashire. The Council urg'd at last, that there was however good Reason to be given why the Court should not exercise this Authority, admitting that they could by Law; because, there were no Persons competitors with the Duke. Where indeed two Persons contend for an Office, 'tis necessary, that the Court should interpose, that the People may know which Officer they are to obey; but in the present Case, they submitted it would be enough to leave the King to lay Claim to his Right by his Quo Warranto. The Court were however of Opinion, that the Information ought to go. They said, it has often been determin'd, that where an Oath is administered in the Presence of a Mayor, against the Mayor's Consent, that Oath is illegally administered, and the Party shall not have the Benefit of it. They could not see the least Foundation to think, that an Oath administered against the Bailiffs Consent, tho' in the Presence of the Bailiffs, could be said to be administered by the Bailiffs; and they should have thought it all one, if the Act had requir'd only that the Oath should be administered before them. Informations of this Nature, they said, were not discretionary; because the Parties interested have no other Remedy, tho' the King has. And in all Cases they are granted, unless where an Omission of an Oath or such sort of Thing is complained of after twenty or thirty Years, which perhaps there are no Memorials of. They said, they could not see, that any Case could require an Information

more than this, where a Tract of Land of 95000 Acres is invested in a Corporation; and where they have Power to give Rules and Ordinances concerning the Land of Occupiers of 300000. In the Case of a Steward of a Court-Baron they allow'd an Information of this sort would not lie, because that is an Office of a private Nature; but in that same Case cited, they said, an Information was granted for the Office of Steward of a Court-Leet; because that concerns the Publick. The Objection as to the Minority of the Duke, they allow'd, was not material. However, for the Reasons beforemention'd, the Court made the Rule absolute as to the Duke; and the other Defendants entered into a Rule, that their Elections should abide the Event of the Validity of his, to save the Expence of several Informations going.

Ashley and Seagrave.

How far the Court of King's Bench will punish the Officers belonging to inferior Courts.

MR. Kettleby came to shew Cause upon a Rule that was made upon the Defendant's Attorney to answer the Matters of an Affidavit. He said the Cause was not in this Court, but in the Marshalsea; and therefore this Court would not interpose, but leave it to that Jurisdiction to correct the Misbehaviour of Attornies, in Causes depending before them. The Chief Justice said, that this Court constantly exercises its Jurisdiction, in correcting the Misbehaviour of Officers in all inferior Jurisdictions. However, J. Probyn observ'd, that the Affidavits, upon which the former Rule was made, were wrong titled, as being made in a Cause depending in this Court; whereas they ought not to have been titled at all. Accordingly the Court discharg'd the former Rule; and said, the Title of the Affidavits must be struck out, and they must be sworn over again.

Woolaston and Vaughan.

The Method which the Court takes of enforcing Process into a Liberty.

MR. Theede mov'd to make absolute a Rule, that had been obtain'd at the Side-bar, for the Bailiff of Cashio in Hertfordshire, to return his Warrant, which the Sheriff had directed to him, to be executed within the Liberty. The Court at first doubted, whether the former Rule was rightly made; however they said, they usually grant such Rules upon the Bailiff of West. And if a Sheriff returns quod Mandavi Ballivo, & nullum mihi dedit responsum; the next Process is a non omittas. Accordingly they made the Rule absolute; tho' the Sheriff had not made his Return to the first Writ. For they said, they ought to know why their first Writ was not executed.

Gifford and Letchmere.

IN an Action against a Lighterman for loosing Goods in conveying them from London into Middlesex, Mr. Strange mov'd, that the Venue might be chang'd, upon an Affidavit, that the Goods, if any where, were lost in Middlesex. But the Court said, that it appear'd upon this very Affidavit, that the Plaintiff was bound to give material Evidence in London, where he had laid his Action; and therefore refus'd the Motion. The Court said besides, that the Defendant had pleaded; and therefore the Motion was wrong upon that Account too.

How far the Court will not change a Venue.

The Town of Pool and —

IN this Case likewise Mr. Hussey mov'd to change the Venue into the County of Dorset, upon an Affidavit, that the Action was for some small Town duties, wherein the Inhabitants were so much interested, that they were afraid, they could not have an impartial Trial in the Town itself. He said, that the Sheriff was Member of the Corporation, and that was another Reason, why the Court would not grant the Motion. The Court said, that the first Reason has constantly been disallow'd, unless in Lord Shaftsbury's Case, which has always been complain'd of. And as to the last Reason, they said, the proper Method then was to enter this upon the Roll, and pray a Writ to the Coroner. Skin. 40.

How far the Court will not change the Venue, by Reason of an Exception to the Sheriff's being interested in the Cause.

Townsend and Brown and others.

MR. Fazakerly now mov'd again to make the Rule absolute in the second Action. But before Mr. Lee began to give his Answer, 'twas discover'd that the Bail-Bond bore Date a Day in January was Twelve-month before Hilary Term began, and the Writ itself was returnable the last Day of that Term; so that the Court said, upon this State of the Case, the Bond itself appear'd to have been given wrong. Accordingly they made the Rule absolute for staying Proceedings upon it directly.

Vide ante 278.

Anonymus.

IN a Motion to justify Bail, Mr. Marsh said, that he should not oppose the doing it; but that the Defendant had frequently given them Notice of Motion, or putting in Sham-bail; and when the Council attended to oppose it, the Defendant would not go on upon the Notice. For which Reason he hop'd, that the Defendant should pay Costs before the Bail should be allow'd to justify. And this, he said, was a common Motion in the Common-Pleas. J. Reynolds and J. Probyn said, that they knew of no such Terms

How far the Court allows Bail to justify, without putting any Terms upon the Defendant.

Terms, when they attended there; and Costs were not allow'd.

Wilson and Poulter.

Vide ante
142.

THERE having been a new Trial had, and another Case more fully stated for the Opinion of the Court, wherein it was admitted, that the Defendant knew of the Act of Bankruptcy, the Matter was again shortly argu'd. The Court were unanimous, that the Affirmance of the Conversion in part was an Affirmance of it in the whole, and therefore the Plaintiff could not recover upon the second Count. And they seem'd to think it something doubtful, whether even the changing this Money into the South-Sea and East-India Bonds was a Conversion. However there was no Occasion to give any Opinion as to that Point. So upon the first Count only the Plaintiff had Judgment.

Short and Scurry.

Vide ante
156.

THE Defendant having obtain'd a Rule for Restitution, M^r. Taylor inform'd the Court, that the Plaintiff had run away and left the Key of the House with his Wife, and that she did not live in it, but actually refus'd to deliver Possession. Upon which he mov'd for an Attachment against her. The Court said, that they saw no Reason, why the Defendant could not break open the Door and put himself into Possession; for which Reason they refus'd the Motion. *Ex relata.*

Myonet and Broom.

Vide ante
276.

MR. Kettleby now came to shew Cause. He said, this Matter was originally in Chancery, an Issue at Law was directed, and the Plaintiff fail'd in his Recovery there, not upon the Merits, which was the Quantum of what was due, but upon a collateral Point. When the Parties went back into Chancery, the Court there order'd the Defendant to waive the Benefit of this Nonsuit; and to go to Trial again upon the same Record. He said, that the Parties did go again to Trial, that a Verdict was had against the Defendant upon the Merits, that Judgment was enter'd accordingly; and that now therefore the Proceedings against the Bail were regular. But this Court was of Opinion, that the Nonsuit being regular upon the first Trial, the Bail were thereby properly discharged; and that now therefore the Proceedings against them were irregular; upon which the Rule was made absolute.

The King *and* The Inhabitants of Abbots-Langley.

THE Court now were clear of Opinion, that the Order of *Vide ante*
Removal was good. They said, they could never see any ^{148.}
Reason for allowing construable Notices upon the Statute of
James; and therefore confirmed the Order.

The King *and* Kendal.

MR. Floyd came to shew Cause upon a Rule, that had been
obtained for quashing an Indiament for exercising a
Trade, without having served an Apprenticeship. The Excep-
tions that M^r. Thomson had taken to it were first, that the In-
diament was in the Borough of Colchester, and no County laid,
wherein that Borough is; and secondly, that the Indiament on-
ly charges in general, that the Defendant exercised this Trade
the first Year of the present King, without saying in what
Month of the Year it was. Now, he said, the Act of Parlia-
ment gives so much a Month Forfeiture for the Time the Of-
fence is committed, and therefore it was material for the In-
diament to have charged how many Months the Defendant
exercised it. The Court said, the first Exception was clearly
fatal, and therefore made the Rule absolute.

What shall
not be a
good Indiam-
ment for ex-
ercising a
Trade with-
out having
served an
Apprentice-
ship.

The King *and* The Archbishop of Armagh and
Dr. Whaley.

Yesterday Serjeant Hawkins obtained a Rule to shew Cause, *Vide ante*
why a Warrant of Attorney should not be taken off the ^{170.}
file, which was filed for the Defendant in the Action here, since
he had brought a Writ of Error in Parliament, and assigned
the Want of an Original for Error there. M^r. Reeves and M^r.
Fazakerly came now to shew Cause, and said, that the Fact sta-
ted upon the Defendant's Affidavit was, that on the twenty-sixth
of January last, after they had brought their Writ of Error in
Parliament, the Defendant Whaley went into the Office of the
Custos Brevium, and saw there a Warrant of Attorney to M^r.
Monday lying upon the Table, but was not then filed, and that
on the twenty-eighth the Defendants assigned the Want of War-
rant of Attorney for Error; and had accordingly taken out a
Certiorari. The Counsel for the King observed in the first Place,
that it was undoubtedly the constant Practice of the Court for
the Plaintiff in Error to file a Warrant of Attorney for the De-
fendant, and that even after a Writ of Error, brought by the
same Defendant in a superior Court. The Foundation of
which is, that where the Defendant in Error pleads *In nullo est*
erratum, he pays 2 s. 4 d. 2 s. for the Plea, and 4 d. for the War-
rant of Attorney, by which Act he impowers the Plaintiff in Er-
ror to file it. Therefore if the Warrant of Attorney was filed

before the assigning the Warrant of it for Error, undoubtedly Mr. Saunders, who appeared for the King as Plaintiff in Error here, was justifiable in filing it. They said it was intirely uncertain upon the Doctor's Affidavit, whether the Warrant of Attorney was not filed before the twenty-eighth; he has sworn indeed, it was not filed the Twenty-sixth, he has sworn too, it was since filed; but whether before or after the Twenty-eighth is not certain, and therefore, they said, it does not lie upon them to ascertain this Fact and make out that it was filed before; upon this State of the Case, they observed, there was no occasion to enter into the Complaint; because the Complaint is in itself imperfect. But however they urged, that the very bringing the Warrant of Attorney into the Office was making it a Record before the Filing it. To this Purpose Mr. Fazakerly cited the Case of Cock and Baker, where a Writ of Error was brought upon a Judgment in the Common Pleas. Warrant of Original was assigned for Error. The Officer certified there was none. But upon its appearing on Affidavit, that the Original was in the Office, tho' not filed, the Court committed the Officer for his false Return. In the Case of Bynn and Conyers, the Court of Chancery was of Opinion, that a Plea was a Matter of Record from the bringing it into the Office, before filing. And so they said, was the constant Practice of all Affidavits being read before there being filed; yet without Doubt they are considered as Records before they are read. Serjeant Hawkins on the other Side argued, that whatever the Practice might be to omit the filing Instruments of this Sort after they are brought into the Office, yet the Law has declared the Act of Filing to be the Act that makes them Records. He said, he thought this evident from the constant Motion that is made to file Orders and Indiments, that are removed up by Certiorari. Before this Motion, they may be sent down at any Time, but afterwards they cannot. The Court desired to be informed by the Custos Brevium in the first Place, whether the Warrant of Attorney was filed before the twenty-eighth of January, or not; but upon his not being able to give them Satisfaction as to that Time, they desired to know of him farther, whether these Instruments were constantly considered as Records by their coming into the Office, before the Filing. He informed them, that they constantly were, and that he never knew one of them taken back or altered, after it was brought in. Mr. Clark said, that he had always the same Notion of a Declaration in his Office, and Mr. Masterman said the same of an Indiment, that was brought into his. And the Clerks in general said, that Judgments of any Term are not made Rolls of that Term, till just before the Eshoir-day of the next. The Court said, that it appears now not to be material, whether the Warrant of Attorney was filed before the Twenty-eighth or not, but that Instruments of this Nature are Records from there being brought into the Office. They observed too, that there was a clear Difference between these Instances, and those, where Records are removed up by Certiorari. They cannot be sent down, after they are Records of this Court, and for this Reason it is, that the Court is so cautious in admitting them to be Records; and requires, that

that the Filing shall be upon Motion. Accordingly they discharged the Rule. Saund. 249.

The King and The Lady Lawley.

THE Defendant's Counsel opened now their Exceptions in order to obtain a new Trial. The first was the same with the last, that was taken upon the former Argument. The second, that in the Indictment produced in Evidence, the Words were & Juratores præsentant, but in the Information they were & quod Jur' prædict' per Sacramentum prædict' ulterius præsentat' fuisset; whereas the Counsel said, the Word per was left out. The Third, that contrasfecit was used instead of the word controfecit; and yet they urged controfecit was a technical Word. The Fourth, the Information charged the Defendant with seducing the Witness from the Trial scient', that he was a material Evidence. Now scient' they said was to be understood Scienter, which makes it Nonsense. The Fifth, that tamquam verum scriptum was used instead of the Word tanquam. The last Objection was, that the Indictment charged Japhet Crooke with forging a Writing, purporting a Deed to be made between such and such Parties; the Information only, with forging a Deed supposed to be made between those Parties. In Answer to the first of these Exceptions, which was mentioned before, the Court said, that they thought the præterimperfect Tense necessary to be used in the first Indictment, as it would have been, if the Party had declared upon the Lease, but in the Information, they thought the præterpluperfect Tense could only be used, because the Import of this Part of it gives only an historical Relation of a Fact that had happened before. To the second they said they would understand the Contradiction of Jur' to signify Juratoribus, and observed there were no certain Rules to be given for Contradictions, but they were to be governed merely by the Sense of the Party. The Third, they said, was over-ruled in Ward's Case. To the Fourth, they said, they would understand the Scient' to signify sciente. To the Fifth, they observed, that tamquam was an old Word, and signified the same as tanquam. And to the last, they thought the Charges were exactly of the same Nature. The Counsel then desired Leave to move in Arrest of Judgment. The Exception that was first taken, was, that the Information only charged, that the Defendant scient', that Japhet Crooke was indicted for Forgery, but did not aver, that he actually was indicted; whereas the Counsel insisted, that the Information ought to have concluded with a prout patet per Recordum. The second Exception was, that it was not set forth in the Information, that the Defendant pleaded or was ready to go to Trial upon the Indictment, whereas, they said, that was the material Part of the Charge, which made it an Offence. The first of these Exceptions the Court thought there was a good Deal of Weight in. But as to the Second, they said, it was an Offence to give any Obstruction to a Cause that is in a legal Course of Prosecution; and that it is being before or after Pleading was a Matter proper only to be offered in Aggravation

tion or Mitigation of the Punishment. The Counsel then for the Defendant prayed, that she might be bailed for the present and not committed. The King's Counsel opposed it, because they had no Notice of the Bail. But the Chief Justice said, for his own Part he was inclinable to give Judgment for the Defendant; the Counsel for the King desire Time to answer this Exception; and therefore, said, the Court would certainly Bail her. Accordingly she gave her own Recognizance for 200 l. and four Bail by Consent in 100 l.

Fortescue Aland and Mason.

Vide ante
176.

MR. Reeves now argued for the Plaintiff. His Argument was much the same with that of Serjeant Hawkins before. But the Court said, that they had considered of the Exceptions taken to the Plea of the Parol's Demurring, and they certainly should have allowed, that the Plea would not have been well pleaded in the Case of any other Person, but where an Infant prays that the Parol may demur. But, they said, in such a Plea the Party need only shew he is Ter-tenant by Descent, and likewise an Infant; and all other Formalities of pleading are excused him. For the very Import of the Plea is, that he is not able to make the Defence; and it would be absurd therefore, that the Court should require the same Strictness as if he did make one. However Mr. Reeves then said, that he should submit it, the Infant had not so much as made himself Ter-tenant by any certain Averment; and that this was necessary in this Case especially, because the Sheriff had returned upon the Writ of Summons other Persons Ter-tenants, and not the Defendant. But the Court said, that the alledging a Seisin in Fee in Jonathan, and a Descent from him by the Daughter of Jonathan was a sufficient Averment of his own Seisin; and the Return of the Sheriff was not material. Accordingly the Judgment in Ireland was affirmed.

Crowl and Rogers.

How far the
Court will
not grant an
Attachment
against Bail.

MOTION was made for an Attachment against a Man for voluntarily joining himself with one of the Bail below, and giving Bail above with the other Person without the Defendant's Privy, and after that surrendering him in discharge of himself. The Court said, it was undoubtedly justifiable in the Bail below to enter himself Bail above without the Defendant's Consent; and they thought it as clear, that he might procure another Person to be Bail with him. They said, if a Stranger should join himself as Bail without the Privy of the Bail below, they should certainly grant an Attachment against him; but in the present Case, they must take it, that by his going along with the Bail below, and entering himself Bail at the same Time with him, he did it by the Request of the Bail; and accordingly refused to make any Rule.

Harman and Delaney.

MR. Fazakerly and M^r. Strange came to shew Cause upon a Rule, that had been obtained for arresting Judgment in an Action upon the Case for a Libel. The Action was founded upon an Advertisement in a News-Paper. The first Exception that had been taken, was, that the Advertisement was no Libel. The other, admitting it was, that the Libel was not set forth in the Declaration with sufficient certainty. The Declaration set forth, that the Plaintiff had acquired a considerable Skill in making Short-Guns, that he had made one of two Foot six Inches in Barrel for the Prince of Wales, and that it was so much approved of, that he obtained a Patent to be his Highness's Gunsmith. Upon this the Plaintiff farther laid in his Declaration, that on the 28th of December last an Advertisement was put out of his having had this Honour, and thereby it was declared to the World, that his Guns of two Foot six Inches in Barrel, would carry farther than any other Person's Guns of a Foot longer in Barrel. Upon which it was charged that on the 4th of January after, the Defendant put out an Advertisement inter alia to this Purpose. Whereas there was an Account lately in the Craftsman, of M^r. Harman's making Guns of two Foot six Inches in Barrel, this is to advise all Gentlemen to be cautious. The said Gunsmith not daring to engage with any other Artist in Town, nor ever did he make any Experiment, but out of a Leather-Gun, as Gentlemen may be informed at the Cross-Guns in Long-Acre. The Declaration set forth, that this Place was the Defendant's Place of Habitation; and that by Reason of these Words the Plaintiff had lost several Customers. The Counsel for the Plaintiff to the first Objection insisted, that nothing would be incumbent upon them to shew, but only that the Words were a general Reflection upon the Plaintiff in his Skill and Trade, and not barely an Answer to the Plaintiff's Advertisement of his Superiority in Skill. They took Notice, that the Charge upon the Plaintiff in not daring to engage with any other Artist in Town was not confined to his not daring to engage with any other Artist in making these particular Sort of Guns, but extended generally to his not daring to engage with any Artist in Town in making Guns at all. But besides the Counsel took Notice, that the Special Damage, which the Plaintiff has laid, would give him a Cause of Action, though the Advertisement itself should not be thought Libelous. Then as to the Uncertainty of laying the Charge, they said, this constant Form was used, in Informations the most Criminal, and of the most Treasonable Nature; and therefore without Question it would be good in a Declaration of this Sort. M^r. Reeves and M^r. Edward Bootle argued on the other Side; and insisted, that those general Words ought in all proper Construction to be confined to the Sense of the particular Words going before, and to the Sense of the particular Words following after. And as to the Matter of Damages, they said, the Loss of Customers was only a necessary

What shall
be said to
be a Libel.

Consequence from the Advertisement; and therefore could not be considered as special and particular Damage. To this Purpose Mr. Bootle applied a Case out of 2 Lutw. 295. Then as to the Uncertainty of laying the Libel, Mr. Bootle said, that it was true indeed this Method of setting forth the Import of them was allowable, where the Words are such, as they are not capable of receiving an innocent Construction from any other Expressions attending them. But where the Words are in themselves doubtful, he submitted it, the setting out the whole in hæc verba was necessary. And to this Purpose he cited a Case in Carthew 407. as he said, in Point. The Chief Justice and Judge Probyn were of Opinion, that the single Question upon which the first Point turns was, whether the Import of this Advertisement was a Reflection upon the Plaintiff's want of Skill in general, or whether it was an Answer only to the former Advertisement. In the one Case the Intent of the Advertisement must be to shew he is not equal to any in the Trade; in the other, to shew, he is not superior to every one. However Judge Page doubted, whether as this Declaration is laid, and has there has been a general Verdict for the Plaintiff, the Plaintiff ought not to recover, though the Answer to the first Advertisement should be thought particular. He said, the first was not laid to be published by the Plaintiff, and it does not appear, but it might have been published even by the Defendant himself. And he said, this would certainly be a Thing of dangerous Consequence, if once it should be advanced for Law, that a Man might publish an Advertisement in Compliment to another, and then presently after write another Advertisement in Answer to it. However the Court in general agreed, that it would be proper to consider, what was the Sense of this Advertisement a little longer; and therefore ordered a Copy of the Words to be made out and brought to them at their Chambers. To the second Observation, the Court agreed, that no special Damage was laid; that the Damage, whatever it is, was a common and ordinary Effect from the Paper; and that though it had not been specially laid, it might have been given in Evidence. But Judge Page said, if the Declaration had been laid, that by this Means the Plaintiff had lost the Custom of J. S. in particular, that would have been a special Damage clearly. To the other Point none of the Judges delivered their Opinion. So a Rule was made for staying the Judgment till these Questions should be further spoke to.

Vide Post.

Justice

Justice and Jones.

MR. Reeves mov'd for a Rule upon D^r. Bettlesworth, to re-
turn his Writ of Mandamus, the Return being out ye-
sterday. But D^r. Strange said, the constant Practice in these
Cases is only to grant a four Day's Rule. But the Court said,
they knew of no such Practice; accordingly order'd the Writ to
be return'd in two Days.

The Course
of Proceed-
ings in order
to enforce a
Mandamus.

The King and Robinfon.

MR. Filmer mov'd to quash an Indictment at the Quarter-
Sessions for the Town of Saffron-Walden. The first Ex-
ception that he took was, that the Indictment charg'd the De-
fendant with keeping falsum Pondus Angliæ, a Pound Weight,
whereas Pondus signifies Weight in general only. The second,
that the Names of the Jury are not return'd upon the Caption.
The last, that the Justices have not Jurisdiction of this Offence;
but the Leet has properly Conusance of it. The Court said,
that these might be proper Exceptions to be taken upon De-
murrer; but they thought this too great an Offence to quash
an Indictment for.

How far the
Court will
not quash an
Indictment
for a Cheat.

Dunmol and Aldworth.

IN Debt on Bond the Plaintiff's Name appear'd upon Oyer to
be Dunmal; and for this Variance the Defendant demurred
specially, and the Plaintiff join'd in Demurrer. M^r. Gapper ar-
gu'd for the Defendant, that however small the Variation may
be in the different ways of setting out a Person's Name, yet
that Variation is fatal, if it be specially shewn for Cause of De-
murrer. And he said, there were Authorities in the Books to
justify this Rule. In Brooks's Abridgment, Title misnomer,
Longwot and Longwat were held material Variances. In Cr.
Eliz. an Outlawry was revers'd, for the Defendant's Name
being laid to be Elred in the Original and Eldred in the Ca-
pias. And rather a stronger Case was cited in that, where
Walwyn and Walweyn were held material Variations. So Hil.
2. of his present Majesty, Scurray and Scurry were held the
same. But D^r. Strange insist'd on the other Side, that the
Resolutions upon this Head have been both Ways, and there-
fore the Court will give their Judgment according to the Rea-
son of the Thing. In the Case of Fen and Alston, Mic. 5. of
the late King, Debt upon Bond was brought by one of the
Name of Samuel; upon Oyer 'twas Samul; but the Court said
in that Case they would read Samul for Samuel. Mich. 6. of the
same King, in the Case of Aylebury and Wallby, the Defen-
dant's Place of Abode was described in the Declaration by an
alias dict' nuper de Waltham-Abbey, but upon Oyer by an alias dict'
nuper de Waltham-Abby, and held immaterial. Trin. 2. of the pre-
sent

What shall
not be said to
be a Variance
in a Person's
Name.

sent King, Uleskelf and Ulleskelf were held the same. So was Baxxter and Baxter, 3 H. 4. 4. He cited too 1 Keb. 105. The Court seem'd to think, that the Variance between Longwot and Longwat was directly the same with the present Case. And Judge Reynolds said, that however such a Variance might be got over in setting out another's Name, he thought the Court could hardly go so far, where 'tis in a Man's own Name. The Court agreed, that the only Reason for the Case of Fen and Alston must be, that Samul might be read as a Contraction for Samuel. However they thought proper, that this Matter should stand over.

Vide post.

— and Munson.

What shall
be said to be
a good Mo-
dus.

Canc. **T**HIS was a Bill brought to establish a Modus. The Bill set forth, that there was a Custom in the Parish of Burr, that all Persons occupying Pasture and Meadow there, should be discharg'd of Tithes in kind, by paying 4 d. an Acre, unless they were Inhabitants of that Parish, or of the Parish of — The Plaintiffs were Occupiers of Pasture and Meadow Ground in this Parish, but Inhabitants in the Parish of Wintthorp. And whether this Modus was good or not was the Question. The Defendant's Council objected, that the Modus was uncertain, and entirely depending upon the Will of the Occupiers; and besides they said, it was most unreasonable, that Foreigners should be preferred before the Inhabitants. They observ'd, that it would greatly encourage a dispeopling in the Parish, which was of all things to be discountenanc'd. And cited a Case in Lev. 116. which is reported too in Keble, where this very Point is determined, and that between the same Parties in Interest as are at present. But the Attorney General and Mr. Wills on the other Side argu'd, that every Modus supposes in itself a Contract; and therefore unless this Contract would be void, tho' written Evidence could be produced of it, this Modus shall not neither, tho' it carries with it only presumptive Evidence of there being such a Contract. Now they observ'd, this Modus would undoubtedly have been good, if it had been general, without distinction of Persons; and how can the Defendant complain, when the Restriction, that is introduc'd, is merely for his Benefit? They observ'd, that however strong the Authority of the Case cited may be, there were other Cases of as great Authority, directly of the other Side of the Question. To this Purpose Mr. Crew, who was of the same Side, cited Rot. 1548. Hil. 16. Ch. 1. in the Common-Pleas. The Case of Bigger, Alcar of Eastwen, against Luddel in the Exchequer, which was Trin. 12. Ch. 2. Mich. 2. Will. & Mary. Blaxton and Langton in the same Court. Mr. Wills farther urg'd too, that if there should be any Fraud or Collusion in this Case, a Court of Equity would relieve, as it does in all other. And to this Purpose he applied two Cases in 1 Lev. 99. and More 913. Judge Reynolds and Judge Fortescue assisted the Chancellor in determining this Question. They all unanimously agreed, that Modus's were real Compositions by Parson, Patron, and Ordinary, the written Evidence of which is lost; but the Law presumes there

there was such by the long uninterrupted Usage. Undoubtedly they said, there would have been no Dispute about this Modus, if it had been without Restrictions; and as the Restriction is for the Benefit of the Parson, they thought the Restriction could make no Difference. They all allow'd however, that something must be due from the Modus, and that too every Year; for as no Prescription can be in a non decimando generally, and at all Times; so neither can it be for so long a Time as a Year together. They seem'd to Allow too, that a Modus would not be good, where it depends upon the Will of the Occupiers, whether it should be more or less. But here they said, the Rule for the Payment of this Modus is as certain, as the Rule for Payment of any other Modus possibly can be; the only Variation is as to the Persons paying the Modus, and that, they said, was never an Objection. The Authority of the Case in Keeble, they said, was to be suspected; or at least 'tis probable, that a Prohibition was obtain'd in some other Court; otherwise it cannot be supposed, that the Parson of this same Parish would have contented himself with receiving the Modus of the Outliers ever since that Time, which the Case is reported of. Accordingly the Chancellor was going to decree for the Modus, but tho' the Proof was very clear to support it, he gave the Defendant's Counsel a Day to talk with their Client, whether they would have the Modus tried or not; as it did concern the Inheritance.

Note; The Court unanimously agreed, that the same Land may at one Time pay Tithe in kind, at another Time a Modus, where there are different Circumstances; the only Thing essential to a Modus is, that the same Land should not pay Tithe in kind and a Modus both, where there are the same Circumstances.

The King and Lady Lawley.

MR. Reeves and several other Council came now to answer the first Exception in Arrest of Judgment, which the Court thought, there was a good deal of Weight in before. They said, they must allow, that every material Point must be laid with so much Certainty in an Indictment, as that a Traverse may be taken upon that Point; but this, they said, is no more than is requisite in Declarations; and therefore the Rule of one and the other in this Respect they hop'd would be the same. They said, it would be easy to mention Cases, where even implied Averments have been allow'd to Points, that are very material. And to this Purpose, they cited Dyer 304. 2 Lev. 50. and a Case in Arnold 367. where a Tenant for Life made a Lease for three Years, and the Lessee brought an Ejectment. He only laid in his Declaration, that Termino nondum finito, he was ejected; but yet that was held a sufficient Averment of the Tenant for Life's being living. They observed besides in the present Case, that the Sciente is directly traverseable; a Licet is held to be so in a Case in Plowden; and many Instances might be produced to shew, that Sciente is in Law as direct an Averment, as quod scivit. They said farther, that many of the best Precedents

cedents were directly as this is. Tremayne 156, 143, 144 and 155. But they relied chiefly upon two Cases in those Entries, one in Page 174, the other in 175, the Case of The King and Brooks. The first of which Cases, they took to be directly as the present Case. The Defendant there was indicted, that he bene sciente, that Mary Parker was not at a Convent, persuaded her to swear she was. Judgment indeed was arrested there; but this not so much as mentioned as an Exception. Then as to the other Part of the Objection about the Conclusion, with a prout patet per Recordum, they had look'd into the Precedents of Indictments for Perjury, where such Conclusion was necessary, if any where; but they could not find, that any one of them scarce did conclude so. But Mr. Fazakerly, and some others of Counsel on the other Side argued, that however certain enough this might be in a Declaration, and however strong the Inference might be, that if the Defendant knew there was such an Indictment, as that against Crooke, such an Indictment there must have been; yet the Law requires, that every material Fact in an Indictment should be set out with positive and express, and not argumentative Certainty. To this Purpose a very strong Case was cited of The King and Knight, Salk. 375. and The King and Croust, Trin. 10. of his late Majesty. The Indictment there set forth, that quod cum the Defendant had been before indicted and convicted at the Sessions, he had disobeyed the Sessions Order. This Indictment was demurred to, and held to be bad, merely for the Uncertainty; and yet every Day's Experience shews, that quod cum is good in a Declaration. They said, however, that they might admit, if the Information had concluded with a prout patet, this might have made the other Part of the Sentence sufficiently certain; because there the Record is referred to, which proves itself. And, they said, the Record in these Cases ought to be the Trial; which gives a Reason for the second Part of the Objection; why this Conclusion is necessary. The Court said nothing to this Part of the Objection; but to the other, they at present thought, that there were Cases to be found in the Books, which lay it down as an express Rule, that no Inference can be allow'd of in a material Part of an Indictment, however certain and necessary, that Inference may be the Inference in the present Case, they agreed it was as certain and direct, as any Inference possibly can be; and that sciente was as strong as quod scivit, but at present they doubted the Resolutions in the Books would not allow it. If this was so, they said, the Forms of extrajudicial Precedents were not to be regarded. However they thought proper it should be farther considered of.

Vide post.

The King and Dr. Ward.

Vide ante
151.

MR. Wills came to shew Cause, why the Rule should not be made absolute. He said, the State of the Fact was, that Sharp had this Office granted to him for Life, exercendum per se vel sufficientem Deputatum. Shaw had been formerly appointed Deputy to him, but was deprived by the Archbishop for Misbehaviour. An Appeal upon this was brought before the Delegates; and they granted an Inhibition to the Defendant, that he

he should swear no Person in as Deputy, till that Suit should be determined. Sharp indeed has thought proper since to withdraw his Deputation from Shaw, and has appointed Dryden his Deputy, in whose Behalf the Application is now made. He said, upon this State of the Case he submitted it this Court would not interpose, for the Uncertainty the Defendant must lie under in knowing which Jurisdiction he must obey. So the Court refused to grant a Mandamus to the Bishop of London, in the Dispute between Dr. Macrow and Mr. Vincent, Mich. 13. of the late King; by Reason the Cause was then depending in the Exchequer. However he farther urg'd, that this Court had no Jurisdiction to grant Mandamus's in Case of Officers belonging to the Ecclesiastical Courts. In Shower 219. 'tis held a Mandamus does not lie to admit a Proctor; and in Keeble 615. express that it does not lie to admit a Register himself. But no Foundation there was to think it would lie for a Deputy, even to a Temporal Office. So is 1 Lev. 306. And Shower 253. Mr. Lee and Mr. Strange on the other Side argued, that they should admit perhaps, that a Mandamus would not lie for a Proctor; the Authority in Cart. 160. is so; the Reason possibly of which may be, that Proctors are Members of the Society of Doctors-Commons, and are in the Nature something of Fellows of Colleges. But Hill. 1726, a Mandamus was granted in the Case of a Parator General, and a Trial upon that was actually had before the Chief Justice. They said too, that they should allow, that the 134th Canon, that was made in King James I's Time, gave Bishops a Power to suspend Ecclesiastical Officers, and put others in their Room during the Suspension; but they can have no Authority to deprive, but this Court will grant Mandamus's. Then as to the Complaint being made in Behalf of a Deputy, they said, the Principal himself in this Case applied for the Mandamus in Behalf of his Deputy; and this Answer eases the Objection in Lev. 306. which Case is reported rather in their Favour in 1 Ven. 110. The Court said, that the single Question in this Case was, whether the Office was proper to grant a Mandamus for; if so, the Inhibition by the Delegates was without Authority; and therefore they should certainly interpose. They said, Mandamus's have been granted even in Case of Officers at Will, and that too to require the Parties themselves to restore them who turned them out, notwithstanding they might the next Instant remove them absolutely. That, they said, was the very Case of Serjeant Whitacre. He was Recorder at Will; the Town of Ipswich illegally removed him; a Mandamus was granted to restore him; and immediately after they obey'd the Writ, they depriv'd him again. For which Reason Judge Reynolds said his Opinion was, that the Mandamus would lie in Behalf of the Deputy himself, as the Party had no other Remedy. The Court said, at least this was a doubtful Matter; and therefore granted the Mandamus, that they might have the Benefit of this upon the Return.

Robinson *and* Noble.Vide ante
274.

MR. Reeves and M^r. Strange now came to shew Cause. They said, that the By-Law, as set forth upon the Return to the Habeas Corpus, was too general; it being, that no Freeman of the City shall employ another as Journeyman, unless such Journeyman be free of the City too; and this without any Exception, whether there be sufficient Journeymen Freemen within the City or not. And, they said, in Truth the Fact was so, that there are several hundred Journeymen employed in this Trade of a Shoe-maker, more than there are Freemen to work in it. M^r. Strange then took another Objection, that the Custom set forth upon the Return is, that no Person occupying any Trade or Mystery, who is free of the City, shall employ any Foreigner; but the By-Law set forth is, that no Freeman in general shall employ such Person. They said, the By-Law here is more extensive than the Custom; whereas the By-Law cannot be supported without the Custom. The Court agreed, that there being not a sufficient Number of Journeymen Freemen within the City, might be a sufficient Justification for the Defendant to plead to the Action brought against him upon the By-Law; and Judge Page said, he believed, he might take Advantage of this Matter in Evidence upon the general Issue of Nil debet. But they thought, this was no Objection to the By-Law itself. And in the Case of the Free-Porters of the City of London, they said, nothing of this was set out upon the Return of their being a sufficient Number of Free-Porters. But however, the second Objection they thought had a good deal of Weight in it. So this Matter was ordered to stand over.

Vide post.

Harcourt *and* Ballard.The Time
which a pri-
vileg'd Per-
son is bound to
declare in.

A Judgment having been referred to the Master for irregularity, he reported, that the Suit was by Writ of Privilege, brought by an Officer of this Court; but he did not declare till within a Term after the Writ was returnable. However he signed his Judgment for Want of the Defendant's Pleading within four Days after. This the Master reported to be irregular, for by not declaring immediately, he waived the Advantage he might otherwise have had. Accordingly the Court set the Judgment aside.

The King *and* Hill.Vide ante
259.

MR. Reeves now coming to shew Cause, the Court was of Opinion, that tho' this was an Offence before the Act of Parliament, yet the Intent of the Legislature was, that the Offender should be punished only in a summary Method, by applying to the Court where the Offence was committed; and therefore refused to interpose their Authority by Information.

Ragg and King.

A Rule having been made to shew Cause, why a Prohibition should not go to the Admiralty-Court, in a Suit there for Wages brought by a Master and Boatswain of a Ship; D^r. Henchman and M^r. Birch came to discharge it. The Court said, that this Matter has been fully settled in the Case of King and Player, that the Admiralty-Court has no Jurisdiction in decreeing Wages for a Master of a Ship, where the Contract is upon Land; and therefore made the Rule absolute as to the Master, and discharged it as to the Boatswain.

How far the Admiralty-Court has no Jurisdiction in Case of Wages belonging to the Master of a Ship.

The King and the Inhabitants of Sabridgeworth.

MR. Lee moved to quash an Order of Removal, made by two Justices, and confirmed by an Order of Sessions. A special Case was stated upon the Order, that a Father had made a Surrender of a Copyhold Estate, lying in the Parish of Sabridgeworth, of the Value of 25 s. per Annum, to the Use of his eldest Son and his Heirs; and upon that the Son went and liv'd there; which the Justices adjudged not to be a good Settlement; and accordingly removed him to the Place of Settlement he had gained before. M^r. Lee insisted, that this Case was not within the Provision of the Stat. of 9 Geo. I. which provides, that no Person shall gain a Settlement by purchasing any Tenement, unless such Purchase be of the Value of 30 l. He said, this was a voluntary Provision in Consideration of natural Affection, and therefore not within the Reason of that Act of Parliament. He said besides, that if this Land had descended to the Son, this would have gain'd him a Settlement, within the Words of the Act. And that he took to be much the same, as the present Case. But the Court said, that the Intent of this Statute was to prevent Persons gaining Settlements, who were any ways likely to be chargeable; and therefore provided, that they should be able to lay out in a Purchase 30 l. They said therefore, that the Intent of the Parliament must be to prevent Persons gaining a Settlement, merely by a voluntary Gift of Land under that Value. Upon which M^r. Lee then took an Exception to the first Order for its being for Removal of a Man, his Wife and four Children, without saying, that they were his Children. But the Court over-ruled that Exception too. Accordingly confirm'd both Orders.

What shall not be a good Settlement, within 9 Geo. I.

Anonymus.

What relates
to changing
of Venues.

THE Defendant had obtained a Rule for changing the Venue; and now after Issue joined, Mr. Gapper moved, that the Plaintiff might have his Venue changed back again upon entering into the common Rule to give material Evidence in the County, where he had at first laid it. But the Court said, that the Rule upon the Plaintiff and Defendant in these Cases is mutual, that a Venue cannot be changed one way or the other after Delivery or Acceptance of a Plea. And the Plaintiff, they said, is under no Difficulty by this Means, because the Defendant is obliged to serve the Plaintiff with the Rule for changing the Venue, before he delivers his Plea; and that is sufficient Notice to the Plaintiff to move to have it changed back again, before he accepts the Plea.

The King and Martha Bryan.

How far a
Cheat shall
not be said to
be Indictable.

MR. Fazakerly moved in Arrest of Judgment in an Indictment for a Cheat. The Fact charged by the Indictment, was, that the Defendant came to one Mr. Langley's, a Tradesman, to take up Silks for the Queen by a pretended Order from the Countess of Pomfret. The Counsel insisted, that this was not an Offence indictable, as no false Tokens were used; and to this Purpose cited Salk. 379. 6 Mod. 105, 311. and they said, there was a stronger Case, then these in Jones, where the Party was actually imposed upon, by delivering his Goods, and yet the Offence held not to be Indictable. They said, this was farther prov'd by the Statute of 33 H. 8. c. 1. which gives a particular Punishment, where Offenders of this Sort use false Tokens, but takes no Notice of such Offenders, where they use none. Mr. Reeves was of the other Side, but said, he was not prepared to answer this Objection at present; so the Matter was ordered to stand over.

Vide post.

The King and Dr. Bettsworth.

Vide ante

DR. Bettsworth now returned to the Mandamus, that the Law and Practice of the Ecclesiastical Courts was constantly to grant these Commissions at the Request of any Creditor, upon his entering a Caveat against the Probate of the Will. Mr. Wills and Mr. Strange argued, that this Return was good. They said, Commissions of this Nature were for the Benefit of the Creditors; for by this Means they have a sure Account of the Effects to their Satisfaction; whereas otherwise they have only the Executor's own Oath as to the Truth of the Inventory. But the Court declared, that they would not suffer Commissions of this Sort to delay the Probate of Wills; because till Probate the Executor has no legal

gal Power of gathering in the Effects, and in the mean Time the Effects of the Testator may be all wasted. And Judge Page observed, that Mandamus's have been allowed to enforce the granting of a Probate of a Will, where the Ecclesiastical Court insisted upon Caution; and that though the Executor was a Bankrupt. Commissions of this Sort are taken out at the Expence of the Assets, and not at the Creditors Charge; and they thought them of dangerous Consequence to delay a Probate. Judge Reynolds said, that where a Will is under a Litigation, Commissions of this Sort are reasonable to protect the Estate; but here they put a Stop to a Man's enjoying the Benefit of a Right, which the Testator himself has given him. Mr. Strange then excepted to the Mandamus, that it only recited, that Lord Londonderry died at St. Christophers, leaving bona & catalla in West', and several other Places; and upon that commanded the Archbishop of Canterbury to grant the Probate of the Will; but did not set out that these Places were within the Province of Canterbury. And West', he said, was a distinct Jurisdiction, and not Part of the Diocese of London; and the Court could not take Notice, that it was Part of the Province of Canterbury. But besides, he observed, that the Probate of the Testaments of all Persons dying in the Foreign Plantations belongs to the Bishop of London. But the Court said, that it was resolved in the Case of Adams against the Cotenants of Savage, that they are bound to take Notice under what Ecclesiastical Jurisdiction they sit. And they said, that it was true indeed, where a Person dies beyond Sea, leaving no Goods, here the Bishop of London grants the Probate of the Will, but where there are Goods are in a Diocese here as well as in the Foreign Plantations the Archbishop has a right of Probate. Accordingly the Court granted a peremptory Mandamus, 6 Mod. 134. The Court by Way of a second Answer to this Exception said, that the Judge by his Return had admitted his exercising a Jurisdiction in the Probate of the present Will; and therefore they should not suffer him to except against his having Authority to prove it. 3 Cro. 106.

The King and The Overseers of the Parish of Canton.

IN a Return to a Mandamus directed to the Defendants to make a Rate for the Relief of the Poor, they set forth, that an Order was made upon them by the Sessions to make such Rate; but that Order appeared to be bad upon the Face of it; then they conclude, that *virtute Ordinis prædicti*, they made a Rate accordingly. Exception was taken to this Return, that it appears the Overseers acted without Authority, and therefore that the Return was bad. But the Court said, that Overseers have an Authority to make such Rate themselves without an Order from the Justices; and therefore the Return was held to be good.

When a Mandamus is directed to Overseers to make a Rate what shall be said to be a good Return to it.

The

The King *and* Hawkes.Vide ante
312.

MR. Pazakerly now argued His Case again, and relied up-
on the same Exceptions he took before. But the Court
were now of Opinion that the first Exception might be got
over. They said, comparuit being coupled with an allocutus est
has in Law Latin a present Signification, like a consideratum
est, which must have that Sense, or else their Judgments would
be all bad. But however they thought the second Exception
could not be got over; the Conviction of the Justices is no-
thing but in the Nature of a Verdict, which finds the Fact,
and therefore they ought to have went on, and given the
Judgment likewise. They did allow, that it was not ne-
cessary for the Justices to apportion the Penalty, but it is
necessary for them to give Judgment that the Defendant
shall forfeit the Penalty. The Court mentioned too the Ob-
servation, that was made before of the last Statutes repealing
the first by Construction; and said, they were of the same Op-
inion. Accordingly the Court quashed the Conviction.

The Mayor of Basingstoke *and* Bonner.How far one
Court will
discharge an
Attorney of
another upon
common
Bail.

IN Debt for Rent brought against the Defendant, who was an
Attorney of the Common Pleas, Mr. Abney moved he might
be discharged upon common Bail, and produced his Certifi-
cate. He said there are Cases in 1 Mod. 10. and Salk. 544.
where Attornies of this Court have been discharged upon com-
mon Bail; and in 2 Mod. 182. and lately in the Common Pleas
in Baresby's Case, where Attornies of one Court have been
discharged upon common Bail in the other. The Court said,
if the Certificate had not been produced, they would not have
discharged him barely upon Affidavits; but as the Certificate
was produced, they did; because the Defendant might imme-
diately plead to the Jurisdiction; and discharge himself of
the Suit intirely.

Sowter *and* Bradfeild.How far
Books of Ac-
count shall
not be allow-
ed to be Evi-
dence.

Lent Assises. **I**N an Action for Goods sold and delivered
a Day-Book and Ledger was offered to
be given in Evidence in Proof of the Goods being delivered.
And the Case of Lord Cobham was cited by Mr. Lee, which
was lately depending in the Exchequer, where a Book was
allowed to be given in Evidence wherein Entries were made
by a Steward of a Modus being paid in discharge of Duties.
But Mr. Baron Carter said, in that Case the Steward was
dead, and as his Evidence would have been allowed, if he had
been living. So the Book shall after his Death. So in
the Case of Sir Stephen Evans in the Exchequer, likewise En-
tries were made by a Book-keeper to charge the Defendant,
and

and that Book was allowed too in Evidence. But in the present Case the Books were kept by the Shop-keeper himself, and therefore the Court would not suffer them to be read.

Hawkes and King.

The same Assises. **I**N an Action of Trover brought against an Inn-keeper for a Horse, he pleaded Not guilty. And upon Evidence he shewed, that the Horse continued in the Inn so long, that he had eat more Hay and Corn, than he was worth; and upon this the Defendant got the Horse appraised, and took him himself at the Price he was appraised at. The Judge said in this Action the Defendant could have pleaded nothing, but Not guilty; but whether this Evidence would maintain such Issue, he thought was a Question, that deserved Consideration. He said, the Custom of the City of London would undoubtedly warrant an Inn-keeper to appraise and sell a Horse in the present Circumstances, and he thought that he could follow no better Rule than that. But yet in the present Case the Defendant could not justify what he did; because he took the Horse to himself. Salk. 654.

The Remedies which the Law allows an Inn-keeper.

Pitkern and Ellis.

The same Assises. **I**N an Action of Trespass brought by a Parson against the Executor of his Predecessor for Dilapidations, it was held by the Court, that it was incumbent upon the Plaintiff to prove his declaring his Assent to the Articles, and his taking the Oaths, inasmuch as he was complete Parson, but in February last. And the Court would not suffer any Proof to be offered of his having taken the Oaths, but Matter of Record. However the Judge said, it was not necessary to prove Institution and Induction. And the Reason for this Distinction is, that in the first Case an Act of Parliament has declared the Church to be void, where these Ceremonies are not performed, in the other not. The Judge observed farther, that even this is not necessary to be proved where the Parson has been in for several Years. And this is the constant Practice in the Exchequer.

How far a Parson must prove his declaring his Assent to the Articles of the Church of England.

Goody and Moseley.

Same Assises. **I**N an Action for Money laid out to Defendant's Use, it was held upon Evidence, that a promissory Note given to the Plaintiff's Testator to allow a young Student at Cambridge 20 l. per Annum, would not maintain the Declaration; though it appeared the Testator had laid out this Sum yearly for the Defendant, because the Defendant refused to do it himself.

When an Action is brought for Money laid out to the Defendant's Use, what shall be good Evidence to support such Action.

Odel and King.

How far a
Lessee for
Years cannot
maintain
Trespals for
cutting down
of Trees.

Same Assises.

IN Trespals brought by the Plaintiff for cutting down his Trees, the Plaintiff was nonsuited, because it appeared, that he was only Lessee. Tho' the Judge said, it was held in the Duke of Somerset's Case, that Trespals would lie in such Case by Coppyholder against his Lord. Salk. 638.

Anonymus.

When an
Action is
brought for
Words, how
far the
Plaintiff shall
not be allow-
ed to give
special Da-
mage in E-
vidence.

Same Assises.

IN an Action for Words, importing a Charge of Felony, spoken of the Defendant, who was a Trader in the Country, M^r Lee, who was Counsel for the Plaintiff, would have given Evidence of special Damage necessarily resulting from the Words, though not particularly laid in the Declaration. To this Purpose he cited the Case of Harman and Delaney determined last Term in the King's Bench. But the Court refused this Evidence, and said it was never allowed, but in an Action for Words, spoke against a young Woman, where there is the general Conclusion in the Declaration of alia enormia ei intulit. There indeed the Court does allow of Evidence of her Loss of Marriage, because that is opprobria loqui. Sid. 225.

The King and How.

What shall
be only
Manslaugh-
ter.

Same Assises.

IN an Indictment for Murder it was laid down by the Court as a Principle of Law, that wherever a Man strikes another without Authority, and upon that the other kills him, such Offence is only Manslaughter. And the Court said, that this has been carried so far, as to be but Manslaughter, even where a Man's Horse is only struck first. Upon this Rule of Law the Court accordingly directed the Jury to acquit the Defendant of Murder. The Court said likewise in this Case, that the Counsel for the King had no right to reply, and accordingly refused to allow them to do it. The Jury upon this brought the Defendant in guilty only of Manslaughter; and then the Defendant prayed his Clergy. The Counsel for the King then offered to arraign the Defendant upon an Indictment of Manslaughter only. Upon which the Court told the Prisoner at the Bar, he must plead auterfoits acquit prout patet per recordum. The Court observed farther, that the very Prayer of Clergy was a Bar to any Appeal. But they would consider, whether it was necessary for the Defendant to read or not. And upon looking into the Statute of Will. & Mar. relating to the Clergy, the Court was of Opinion, that in no Case the Reading is necessary.

Term. Hill. 2 Geo. II. 1728.

Pitt and Norman.

At the Sittings in London. **I**N an Action for Money, which certain East-India Goods were sold for at Auction, the Plaintiff in his Declaration set forth Part of the Articles of Sale in hæc verba, but not the Whole. Upon which Mr. Kettleby took an Exception, that there was a Variance between the Declaration and the Evidence. And the Chief Justice at Nisi prius in Guild-Hall allowed of the Exception. He said too, that a Person cannot declare upon a general Agreement and give in Evidence a special one. Accordingly the Plaintiff was nonsuited. 3 Lev. 50.

How far a Person cannot declare upon a general Agreement, and give in Evidence a special one.

Coleman and Sayer.

THE Plaintiff brought an Action against the Defendant, as Indorser of an Inland Bill of Exchange, which was drawn by Holt upon Mead, a Banker in London, payable six Days after Sight. One of the Questions that fell out upon the Evidence, was, whether the Day of Sight is to be reckoned one of the six, admitting first, that three Days of Grace are allowable in Inland Bills of Exchange at all; and another, whether the three Days Grace are allowable by the Custom of London, as well where a Bill is payable at certain Days after Sight, as well as where it is payable upon Sight. To the first of these Questions, the Chief Justice at the Sittings in Guild-Hall, said, that the Day of Sight is to be taken exclusive; for the Law will not allow of Fractions in a Day; and to the other he said, the Days of Grace were allowable in one Case, as well as the other. The other Matter then came into Debate, whether three Days of Grace in certain are allowable upon Inland Bills as well as upon Foreign ones, or whether only a reasonable Time. The Common Serjeant and the Foreman of the Jury said, that the constant Practice in the City was to allow them in one Case, as well as the other. Upon which the Chief Justice said, that then he would not alter it; though he observed, that he remembered two Cases, one in Lord Chief Justice Kelynge's Time, the other in Lord Holt's, where they were both of Opinion, that in Inland Bills it is only a reasonable Time; and what that is the Jury ought to determine. These three Points were mentioned, because if the Court had been of another Opinion as to any one of them, the Plaintiff must have clearly been nonsuited; for it fell out upon the Evidence to be proved, that the Acceptor of this Bill went off the second Day after

Within what Time a Bill of Exchange shall be said to be payable.

after the three Days of Grace were over; and the Bill was not noted within that Time. But however, even as this Case was, the Chief Justice was of Opinion, the Indorser was not liable, and accordingly the Plaintiff was nonsuited. *Lutw. 1593.*

Peron and Frone.

When an Action is brought upon a Policy of Assurance how far the Evidence shall be said to maintain the Declaration.

Sittings at Guild-Hall. **T**HIS was an Action upon a Policy of Assurance, that did not run with Interest, and no Interest. Now it happened, that three Persons had a joint Interest in a Ship and Cargo, and one of them sent to the Plaintiff to desire him to get such a Part of the Cargo insured, which accordingly he did in his own Name, and then indorsed upon the Back of the Policy, that it was in Trust for the Person, that gave him this Authority. Yet notwithstanding this he brought his Action upon the Policy generally, without setting forth any particular Manner in which he had a Right to bring it. And this whole Matter being discovered upon the Evidence the Common Serjeant said, he hoped the Plaintiff could not recover. For such a general Way of declaring would be a Means of letting in Fraud, if so remote a Matter as this might be allowed in Evidence. Yet he did admit, that Point of this very Sort fell out upon a Trial before the Lord Chief Justice Eyre, and that was reserved to be spoke to at his Lordship's Chamber, and he was of Counsel in it, but it was over-ruled. The Chief Justice now said, that he had a great Regard for that Opinion; but otherwise he should have thought there had been a good Deal in the Exception; yet as it had been over-ruled so lately, he allowed the Evidence now. And accordingly a Verdict was given for the Plaintiff.

The King and Clerk.

What shall be said to be a Libel.

THIS was an Information, tried before the Chief Justice at the Sittings in London, which charged the Defendant with Printing and Publishing an infamous Libel, call'd *Mist's Weekly Journal*, wherein the King's Title to the Crown was openly struck at, his Legitimacy called in Question, and the Persons of several of the Royal Family scandalously traduced under borrowed Names; by representing the late King under the Name of *Merewits*, his present Majesty under that of *Esress*, the Queen under that of *Sultana*; and at the same Time drawing a beautiful Character of the Pretender by the Name of the young *Sophi*, and setting forth the Tyranny and Subjection all Englishmen lay under, by representing us under the Name of the *Persians*. The Charge against the Defendant was for maliciously and traitterously printing off one of these Papers in particular; but the Evidence produced was, that he acted merely as a Servant to the Printer, and his Business was only to clap down the Press; and few or no Circumstances were offered of his knowing the Import of the Paper, or being conscious of doing any Thing illegal. Upon which Serjeant *Hawkins* took two Exceptions.

tions in his Argument for the Defendant; one, that this Paper ought by no Means to be thought a Libel upon the Royal Family; because the Characters that are here drawn, are by no Means agreeable to the Persons supposed to be represented; but if any Thing relating to them intirely opposite to what each are known to deserve; the other, that the Evidence against the Defendant by no Means comes up to the Charge; for the Fact is charged to be attended with a malicious and traiterous Design, whereas nothing comes out upon the Proof, but that it was done thro' Ignorance, and in Obedience to his Master's Authority. But the Attorney General answered to the first of these Objections, that it lies upon the Counsel for the King only to shew, that this Construction, which they've put upon the Paper, is such, as the Generality of Readers must take it in according to the obvious and natural Sense of it; and if upon the Hearing of the Paper read the Jury are of that Opinion, they are bound in their Consciences to find the Defendant guilty. And to the other the Solicitor General observed, that if they could have given Evidence of express Malice, this Fact would have been Treason within the Statute of 6 Ann. cap. 7. but as it is, the Charge is only for printing and publishing a seditious Libel, and consequently the Circumstances of Malice are intirely immaterial. The Chief Justice accordingly agreed the Law to be so, and said, that in Dr. Brown's Case even Irony was held to be a Libel. So the Jury found the Defendant guilty.

The King and Knell.

THIS was an Information of the same Sort with the former. The Evidence against the Defendant was, that there were two Servants of Mr. Mist, whose Business it was to put the Letters in Order for Readiness to print them off, that the Defendant was one of them, and that this Work was called Composing for the Press. The Defendant and the other accordingly composed together the Printing off this Piece of Persian History, and one took one Column of it downwards, and the other, the other of it. Upon this Evidence Serjeant Hawkins objected, that whatever Interpretation the Whole of this Paper might receive taken together, yet taken separately according to the Shares, which these two Persons had in it, the Part, which the Defendant composed, can by no Means receive such a Construction, and therefore he necessarily must be acquitted. Mr. Kettleby too took another Objection, that the Defendant was charged, quod libellum impressit & publicavit & imprimi & publicari causavit, whereas by the Evidence on the Part of the Crown it appears, that Composing is only previously necessary to the pressing off, and consequently as the Defendant is only proved to have composed, he cannot be found guilty of pressing off, which according to the general Notion of the Word carries with it the same Idea as Printing. And therefore, he said, the Information had not charged the Defendant with a proper Fact. The Counsel for the Defendant objected farther, that no Evidence was offered of a Publication of this

Against what Person an Information may be brought for a Libel.

this Libel, and therefore clearly as to that Part he ought to be acquitted. And besides they said, the Information charges two Offences in distinct and separate Parts of it; one of printing this particular Libel set out in hæc verba; the other of printing a Libel generally; and therefore as to the last Charge, as no Evidence was given of two Offences, the Jury ought at least to acquit the Defendant. To the first Objection the Attorney answered, that this pretended History was a Thing intire, one Part had a Dependance upon the other, and therefore he that is guilty of any one Part, must be guilty of the Whole. To the second, he said, he would agree, that if this was a Civil Suit, an Action brought against the Defendant for Printing without Authority to the Damage of a particular Person, the Evidence given here would not make the Defendant answerable; for he would have appeared to have acted merely as a Servant; and therefore as he had assisted in one Branch only of Printing and not in the Whole, he could not be subject to such an Action. But the present Case, he said, was in a Matter of a criminal Nature, where an Accessory in Part is principal in the Whole; and therefore as the Defendant assisted in the Composing, which was a Circumstance essentially necessary to their being any Printing, he by that Act evidently made himself concerned in the Whole. Besides he said too, composing was taking a Copy of a Libel in Types and Figures, and that would make the Defendant a Publisher; for it has often been determined, that the taking of a Copy of a Libel was an Act of Publication. And this, he said, gave an Answer to the third Objection. And to the last he observed, that laying Informations in this Way was begun in the Lord Chief Justice Holt's Time, and it was done out of Caution for fear they should not succeed in the particular laying of the Fact. The Chief Justice agreed with the Attorney in all but the Act of Publication; but he thought that was merely a Circumstance of Printing; and accordingly directed the Jury to acquit the Defendant as to the Publication; but if they believed the Evidence, to find him guilty of the Printing; and the Jury did so.

The King and Nutt.

Against what
Person an
Information
cannot be
brought for
a Libel.

THE Defendant was indicted likewise for being another of these Publishers of this treasonable Libel. But the Evidence against her was only, that she kept a Pamphlet-Shop, and that there the Libel was sold; but no Evidence was offered to prove her knowing of its being bought in or sold out; nay she proved, that her House where she lived was a Mile from off the Shop, and that she had been bed-ridden there for a long Time; so that the Presumption was on the other Hand, that she really knew nothing of it. Upon which Mr. Kettleby said, he hoped upon this Evidence the Defendant must be acquitted; for though indeed the Act of a Servant may charge a Mistress in a Civil Suit, yet it was by no Means reasonable it should charge her in a criminal Prosecution. He observed too, that that Rule could certainly not hold in all Cases, that all those, through whose

Hands

Hands a Libel goes, are Publishers of it, if they do not discover it; for a Post-Boy that carries a Libel in the common Packet, can certainly not be punishable, as assisting to the Crime. The Chief Justice said, that the Case of the Post-boy was not at present in Question, and therefore there was no occasion to say any Thing to it. But he observed, that if a Servant carries a Libel for his Master, he certainly is answerable for what he does, though he cannot so much as write or read. But however the present Case, the Chief Justice said has been expressly determined, that the Master of a Shop is answerable for whatever Books are sold there. However the Jury thought it a hard Case; and therefore refused to do any Thing else, than find the Circumstances specially, that were given in Evidence before them. But the Attorney General said, that these Circumstances were only Matters proper to induce the Jury to find the Defendant guilty of a Publication, and not suitable to a Special Verdict; for they are only Evidences of a Fact. And therefore he proposed to the Jury, that they should give a general Verdict, and that the Defendant's Counsel should make a Bill of Exceptions to the Directions the Court gave to find the Defendant guilty. But Mr. Kettleby said, that it has been doubted upon these Words in the Statute of Westminster, *proponat billam Exceptionis*, whether The King is within the Benefit of the Act, it being unworthy of him to propose a Bill; but at least he said, it was not so proper a Method as the other. But the Court said, that though this has been doubted, yet in Misdemeanors it has been allowed, and is frequent in the Exchequer upon Penal Statutes. But however the Jury were unwilling to do any Thing more, than what they had declared before; and therefore, as it was something of a hard Case too upon the Defendant, the Attorney General consented to withdraw a Juroꝝ. Lev. 68.

Term.

Term Pasch. 2 Geo. II. 1729.

How far Liberty shall not be given to bring Money into Court, but upon pleading the General Issue.

Anonymus.

C. B. **S**Erjeant Beyfield moved to bring Money into Court, and that they might plead Non Assumpsit infra sex annos. But the Court said, that they never allow these Motions, but upon pleading the General Issue.

Berry and Burk.

When Debt is brought upon a Judgment pending a Writ of Error, upon what Terms the Court will stay Proceedings in such Action.

C. B. **S**Erjeant Baynes moved, that the Court would make a Rule for staying Execution after Judgment should be had in an Action of Debt, that was brought upon a Judgment of this Court pending a Writ of Error. But the Court said, that the old Way in these Cases was to give an Imparance; but in the Case of Jackson and Duckett, Hill. 13 Geo. 1. the Court considered upon this Matter, and thought the best Way was, to have the Defendant give Judgment in the second Action; and accordingly the Counsel agreed to do so, and upon that the Court ordered the Execution to be staid. 2 Ven. 261.

Griffith and Bernley and his Wife.

How far the Court will not discharge a Wife out of Execution.

C. B. **I**N an Action against the Defendants upon a Contract of the Wife dum Sola, the Bail surrendered them in Discharge of themselves. Upon which Serjeant Cummins moved, that the Wife might be discharged. And cited 1 Lev. 217. where upon mean Process such Motion was allowed. To the same Purpose he applied a Case in 51 of the same Book, where an Execution was taken against Baron and Feme by Collusion of the Husband; and there the Wife was discharged. So upon an Outlawry against Husband and Wife, if she is taken, she shall be released out of Custody. But the Court said, these were Cases of Fraud and mean Process, and in them it is so; but they seemed to think in Case of an Execution it might be otherwise; and so here upon a Surrender, because the Words of the Recognisance are, that if Judgment be given against the Defendants, they shall be surrendered. But however this Matter was ordered to stand over to another Day.

Hawkes and Trisbey.

C. B. **S**Erjeant Belfield moved to set aside a Non pros signed before the Effoin-Day of Mich. Term, whereas the Writ was returnable only in Easter Term. The Chief Justice told him, he supposed the Defendant had given Rules to declare, and demanded a Declaration, and therefore the Non pros' was regular after the second Term. And so he said this Practice was settled in the Cases of Moses and Richardson, Pasch. 3 Geo. 1. But he observ'd, that giving Rules to declare and calling for a Declaration, are as necessary in signing Non pros in this Court, as giving Rules to plead; and calling for a Plea is necessary to assigning Judgment for want of Plea in the King's Bench.

How far a Non pros' shall be said to be regular.

Baker and Johnson.

C. B. **I**N Replevins the Defendant avowed for Damage-feasant, the Plaintiff replied a Tender of Amends after the Taking. And now Serjeant Chappel moved in Arrest of Judgment, for the Tender's not being pleaded to before the Impounding. He said this is determined to be bad upon a General Demurrer in Lutwych 1596. And therefore he thought it might be taken Advantage of as well in this Way. The Chief Justice said, that Case was certainly Law, and Pilkington's Case, 5 Coke, is to this Purpose; but he observed, that the Defendant had joined Issue upon the Sufficiency of Amends; and by that Means had waived all Advantage as to the Irregularity of the Tender. But he owned, that if this Action had been in Trespass, it would have been otherwise, even upon a General Demurrer; for the Statute of James 1. says in general, that a Tender of Amends may be well pleaded in Trespass before the Action brought.

When a Tender of Amends is pleaded in Bar to an Avowry for Damage-feasant, how far a Defect in such Plea cannot be taken Advantage of, on a Motion in Arrest of Judgment.

Flowers and his Wife against Gofs.

C. B. **S**Erjeant Eyres moved to set aside a Plea, because it only answered Part of the Declaration, and said nothing to the other Part. Which the Court accordingly did; for they said, if the Plaintiff should join Issue upon it, it would be a Discontinuance in him; and they would not allow a Defendant to shuffle off a Term or two in this Way by a Demurrer. And after this the same Counsel moved to amend his Declaration without paying Costs, as there was at this Time no Plea, and so they made a Rule to shew Cause.

How far the Court will set aside a Plea upon Motion.

Lady Mary Herbert and Lady Karrington, *ver.* Kention and More.

How far a Court of Equity will put off a Trial, being had on Affidavits being laid before them that some of the Parties to the Suit were married.

Scac. **T**HE Plaintiffs had preferred a Bill for the getting up two Notes of very large Sums, which they had given the Defendants, upon a Suggestion, that the whole that was due upon them had been paid. The Cause had proceeded so far, that Issue was joined upon that Fact, and a Trial ready to be had at the Bar. The Defendants came now and laid before the Court several Affidavits to induce them to believe, that Lady Mary Herbert was married to M^r. Gage at the Time of the Bill preferred, and that Lady Karrington was then married to M^r. Mackensy; so that all that had been done in the Cause already was entirely void; and therefore their Counsel hoped that the Court would not let the Plaintiffs proceed at present any farther, till this Matter could be examined into fully upon Interrogatories. The Question now was, whether the Court should stay the Trial upon such an Application. The Chief Baron said his Opinion was, that it might be a Thing of dangerous Consequence to allow of a Motion of this Nature, merely upon Affidavits; but that this Matter ought to have been suggested upon the Roll, or at least a Bill ought to have been filed, setting forth this Matter in a full and proper Manner. This he objected to the Method of this Application. But then he said farther, that he thought it unnecessary to be made at all, as the Circumstances of this Case have been. For the Gentlemen, who are said now to have been privately married to these Ladies, have appeared all along in the Cause assisting them in it; so that tho' there was nothing farther, he thought a Court of Equity would hardly allow them at any Time afterwards to come and tell the Court, they have been giving Judgment in a Cause to no Purpose. But he said upon these Affidavits Rules have been made upon them, to give an Answer to what is alledged in them, and they have given us no Answer as to the Fact, only told us with these Ladies, that this is not a proper Foundation to stay the Trial upon. So that he said, he was of Opinion, the Defendants might go on very securely. But Baron Carter and Baron Cummins said, that they were of Opinion, that the Trial might be said upon Affidavits of this Nature properly enough; for they believed upon what had been said before them, that the Ladies were married; and the putting this Point to be determined upon Interrogatories, might likely end the Suit sooner, than the Method in which the Cause was in already. Accordingly a Rule was made for putting off the Trial, upon the Defendants consenting that the Testimony of the Witnesses, which the Plaintiffs had sent for from France, might be taken before a Judge, and Payment of Costs. 1 Ver. 57.

Anonymus.

Scac. **T**HE Defendant was sued as Administrator Durante minore ætate. And on Rule to shew Cause, the Court allowed him to plead four Pleas to the same Matter; non Assumpsit, non Assumpsit infra sex Annos, plene administravit, & quod Infans ultra annos septem decim natus fuit.

How far the Court will allow a Defendant to plead four Pleas.

Anonymus.

MR. Hussey moved to change the Venue in an Assumpsit which he said the Plaintiff, who was an Attorney, had laid in London, upon an Affidavit that the Cause of Action, if any, arose in Devon. But the Court said, that an Attorney has a Right to lay the Cause of Action in Middlesex, and therefore they observed, it was necessary in these Motions, that it should appear the Venue was not laid there. Upon which Mr. Hussey produced a Copy of the Declaration, by which, he said, it appeared the Venue was laid in London. But the Court said, that an Affidavit ought to be annexed to it, by which it may appear it was a true Copy; for they said indeed, in common Cases they allow Venues to be changed, let the Cause of Action be laid any where, and therefore do not require any Affidavit that the Venue was not laid in a particular County; yet in the Case of an Attorney, as he has a Right to lay the Action in Middlesex, they must.

How far an Affidavit is necessary to be produced on a Motion to change a Venue.

Ux and Haid.

Canc. **T**HIS was a Bill brought to establish a Modus. The Custom set out was, that all the Occupiers of Land, inhabiting in such a Parish, have Time out of Mind been discharged of paying Tithes for the Herbage of all barren and unprofitable Cattle due to the Vicar, by making into Hay all the Tithe-Grass due to the Rector. The Solicitor-General and Mr. Wills were of Counsel for the Defendant. They said that the Modus has been by no Means proved; for the Witnesses have only sworn, that the Parishioners have always made the Tithe-Grass into Hay, and that they have been discharged of paying Tithe of Herbage for Time immemorial; but they have no where said, that they have been discharged of this for that Reason. So that they said, as it stands here, it is a mere Non decimando. But besides they observed, that the Witnesses of their Side swear, that the Outliers have paid Tithe of Hay Time out of Mind, as well as the Inhabitants; but yet it is not pretended, that the Outliers are discharged of the Tithe of Herbage; by which it is plain, that the Reason suggested cannot be the Reason. They went on farther and said, that the Modus too is void in itself; for every Modus must increase in Value, in Proportion as that Thing does, which it is to be a Discharge of.

How far a Modus shall not be good by Reason of its amounting to Non Decimando.

When a Bill is brought to establish a Modus, how far the Court will refuse to do it, by Reason that the Modus, which is proved by the Evidence, materially differs from that which is set forth by the Bill.

of. Therefore they said, it has been determined lately in the Exchequer, that if a Modus is in a Parish, that the Parishioners shall pay such a Sum of Money in certain for all Apples growing in their Orchards, and they make new Orchards, the Modus shall not indeed extend to them. But if the Modus was to pay so many Bushels out of every Orchard, and new Orchards are made, the Court of Exchequer allowed, that the Modus should extend to the new ones. Whereas according to the Doctrine in the present Case, let the Herbage increase ever so much, the Modus must continue as it was at first. And besides they said, this may give Occasion to much Fraud; for not only tho' the Herbage should much increase, but if there should be a Contrivance in the Parish, that the Tithe-Grass should much decrease, the Vicar must still be contented with what is left him. They said too, that this was more hard upon the Vicar, because he receives no Benefit by the Modus. And besides it is a known Thing all over England, that in such Tithe Pay is always paid without any Consideration, tho' perhaps in strict Law, Tithe-Grass is what is only demandable. Lord Chancellor then made his Decree, and said, that the Vicar's receiving no Benefit by this Modus, did not any Ways influence him; because the Vicarage is derived out of the Rectory; and therefore if the Rectory would gain by it, it is the same Thing. But however, he said, he thought the Rectory would not, and that it was a mere Non decimando. And besides, he said, the Modus is clearly not maintained by the Witnesses for the Objection, that has been first made to it. Accordingly dismissed the Bill. Salk. 554.

In the Argument of this Case Mr. Wills said, he would not lay it down for Law, that Tithes of Hay are demandable of common Right; but he observed, that there was some colourable Proof that it was, in that the Decima Garbarum & Fœni, and not the Decima Graminis, is constantly demanded in all the old Records. But Lord Chancellor said, that it was determined in one Reynell's Case in King James 1. Time, which was a Devonshire Case, that only Tithe-Grass is due of common Right.

Aynsworth and Wood

When an Action is brought against a Man for seducing an Apprentice, what shall be good Evidence to support such Action.

Sittings at **T**HE Declaration charged the Defendant quod Apprehticiarium Querentis retinuit & eundem negotiatus fuit, knowing that he had Run away from his Master; by which Means the Apprentice was encouraged to keep from him. But the Chief Justice said, he did not think such an Action would lie; but the proper Remedy was by Way of Action for so much Money paid to the Plaintiff's Apprentice, in Wrong to the Plaintiff. Upon looking farther then into the Declaration it appeared, that it charged the Defendant quod detinuit & custodivit the Apprentice. Now the Evidence produced was, that the Defendant frequently sent Work to him; and tho' this was not an actual Detainer and keeping, yet the Influence of Gain was such upon the Apprentice, that the Counsel said, it amounted to a Detainer in Law. They said it was like unreasonable Threats and

and Fears put upon an Apprentice, the Effect and Consequence is a Detainer from the Master; and therefore they did not see, why such an Action would not lie. The Chief Justice said, in the Case put, a special Action upon the Case would only lie, and in the present Case the Action mentioned before; so the Plaintiff was nonsuited. 2 Lev. 63.

Clay *vers.* Simpson and Wood.

The Duchy Chamber.

MR. Lee informed the Court, that Queen Dowager Katherine, in 1704. by Letters Patent under the Duchy Seal, granted to the Defendant Simpson, the Stewardship of the Honour of Pomfret in Yorkshire, for Thirty-five Years; that the Plaintiff has obtained a Grant of this same Office by Letters Patent, dated in December last, so that there is a Dispute between the two Patentees about the Right to this Office; he said, that this was a Cause wherein the King's Revenue was concerned, and therefore he moved the Court, that they would make an Order upon Wood, who is Simpson's Deputy, to bring into Court all Books and Papers belonging to this Office, to the End, that the Court might appoint a Person proper to exercise the Office during the Suit, in Order that the Revenue may be secured. He said, there were Precedents to be produced, where this Court had proceeded in this Manner upon Motion and giving Notice, as they have now done, tho' no Cause has been depending at the Time, no more than in the present Case. To this Purpose a Precedent was read, Term. Mich. 1697. Kingston and Ashton. The Defendant there claimed a Grant of a Stewardship of one of the King's Manors, under Lord Molineux, who pretended to have had a Grant by Letters Patent of it in Fee. But not being able to produce them, the Court made a Rule upon him to bring the Books and Rolls into Court, and that the Plaintiff should be put into Possession who had Letters Patent, which he produced of the Office; and for the Defendant's not obeying this Order, the Court granted an Attachment. Some other Precedents were produced to the same Purpose. The Chief Baron and Mr. Baron Cummins were the Judges, Assistants to the Court; and they said, that these were Precedents of the Courts having made Rules of this Sort, where it appeared, that the Person in Possession of the Office had not the Right; so possibly if great Doubt had been shewn to the Court in the present Case, which of the two Persons had the Right, they might have proceeded in the like Summary Way; and for the securing of the Revenue, the Court of Exchequer acts something in the same Way; but in the present Case there does not appear any Reason to the Court to think, that the Defendant has not the Right as well as the Possession; for the second Letters Patent might have been granted thro' Misinformation. And therefore the Court did nothing upon the Motion.

When a Right to an Office which relates to the Revenue is in Question, how far the Court will not make an Order for producing the Books relating to that Office.

The King *and* Longbotom *and* Petteris.

What shall
be said to be
a good In-
dictment for
Suborna-
tion of Per-
jury.

How far dif-
ferent Of-
fences can-
not be joined
in one In-
dictment.

Vide post

MR. Strange moved to quash an Indictment of Subornation of Perjury at the Suit of the Prosecutor. One of the Exceptions to it was, that it charged the Defendants & utrumque eorum with suborning four Witnesses & utrumque eorum to give Evidence against one Hayes and his Brother upon an Indictment of Forgery. He said, these were several Charges of several Offences, and yet contained in one Indictment. Accordingly he cited the Case of Giles and Gwyn and others, where an Indictment was held bad for this very Reason. It charged the Defendants there & utrumque eorum with exercising a Trade and not having served an Apprenticeship. He observed too, there was another Exception to this Indictment for its charging the Witnesses with swearing falsely that Hayes and his Brother were guilty of the Forgery, which is too general. Accordingly the Court made a Rule to shew Cause.

Flanigan *and* Adey.

When Debt
is brought
against Bail
what is the
Course of
Proceeding
in such Ac-
tion.

C. B. **I**N Debt against Bail the Court said the Writ must lie in the Office four Days, as well as where the Proceedings are by Scire facias. So they observed too, must the Capias against the Principal in order to charge the Bail. And this was agreed to be the Practice of the King's Bench as well as of this Court. But however the Court said, this was only an Indulgence given by the Practice of the Court, and not by the Law; for the Condition of the Recognisance requires the Defendant to pay the Condemnation Money or else to surrender his Body; now the Surrender of his Body is understood upon the Return of the Capias, and therefore he ought to do it then at all Events. This is the Reason too, they observed, why a Surrender after cannot be pleaded by the Bail, though it be before the Process against them. But by the Practice of the Court, they will stay the Proceedings against Bail, if the Surrender be before the Return of the second Scire Facias. 1 Ven. 262. Salk. 599, 602.

Anonymus.

How far the
Court will
not direct
that Service
upon the
Clerk in
Court shall
be good Ser-
vice.

Canc. **O**NE M^r. Maynard was made Defendant in an Original Cause in this Court; and upon one of the Defendant's dying, the Cause was forced to be revived. Upon an Affidavit now that M^r. Maynard was gone into Ireland, M^r. Lutwyche moved, that Service of a Subpoena upon his Clerk in Court might be good Service upon him to make him appear to this Bill of Revivor. And he said he remembered a like Motion was made in the Case of George Hunter, who went over to Barbadoes. Lord Chancellor said, as that was so far of

of it might be proper in that Case, but refused to do it here till Affidavit first made of Endeavours to serve him there.

Howard *ver.* Newman and Wood.

Sittings at Guild-hall. **T**HE Mother of one Hicks employed the Plaintiff, who was an Attorney, to take out a Commission of Bankruptcy against her Son, she being a Principal Creditor to him; and this was done out of Affection to her Son, in order to set him up a clear Man in the World again. But at the same Time that she gave these Instructions to the Plaintiff, she told him, he must not expect to be paid by her, but must be satisfied out of the Effects of the Bankrupt. The Attorney accordingly laid out several Sums of Money in procuring this Commission before Assignees could be appointed, and when they were nominated, and had agreed to take upon them this Trust by setting their Hands as Parties to the Deed, he was at other Charges too. Upon which he now brought his Action against the Defendants as Assignees to be satisfied for the Whole which he had laid out. It appearing now upon the Face of the Evidence as it stood at present, that the Assignees had not received Effects enough of the Bankrupt in the Whole to answer so much as the Bill of the Attorney, nor were likely to do so; a Doubt arose, whether the Attorney should come upon the Assignees at all; or at most for any more than the Attorney had laid out after they had accepted the Assignment; for they could not be supposed to agree to any more than they themselves were privy to. But the Counsel observed, that as the Effects of the Bankrupt are not likely to answer this Demand; and as the taking out of the Commission by the Mother was not in an Adversary way to get in her Debt, but out of Friendship and Affection to her Son, to the Prejudice perhaps of many of the Creditors, she ought to be answerable to the Attorney. The Fact appearing thus, the Chief Justice said, it was true indeed the Attorney ought to be satisfied first for procuring the Commission; but yet he thought too that would be something of a hard Case that the Assignees should be any farther liable than the Effects amounted to. But then it coming out upon farther Examination, that the Effects were appraised to more than the Bill came to, though the Assignees have not got them into their actual Possession, the Court said, the Plaintiff's Demand was clearly good against them; because they had a right to get them where-ever they can find them. But yet there was another Point upon which the Chief Justice said he thought the Plaintiff must be nonsuited; because the Statute of 3 Jac. 1. requires that every Attorney shall deliver a Bill signed with his own Hand, before he commences a Suit for Fees; now in the present Case it appeared, that the Warrant of Arrest was made out before a Tender of a Bill; for the Bailiff first shewed the Defendants the Bill and demanded the Money, and upon refusal immediately arrested them. Now the Chief Justice said, he was of Opinion the Suit began by taking out the

When an Attorney sues out a Commission of Bankruptcy, against whom he must take his Remedy to recover the Expences of suing out the Commission.

the first Process, which must be intended to be before the Warrant made out; and therefore the Tender after was void. And this Opinion the Chief Justice was of, notwithstanding two Objections made by the Counsel; one that a Taking out a Commission was not a Suit within the Act; the other, that a Court ought not to go out of the Record for the Commencement of the Suit; and upon the Face of the Record, the Suit appears to be of Michaelmas Term last, and the Tender of the Bill was the 17th of October. So upon the whole of this Matter the Parties agreed the Plaintiff should have the whole Bill paid him without Costs. 1 Ven. 135, 370. 2 Ven. 174. 6 Mod. 309.

How far an Attorney is bound to deliver in his Bill before he commences his Action.

Note, The Case of Godfrey and Clerk was cited to be determined upon full Debate in the Common Pleas, that the Attorney must deliver in his Bill before he begins his Suit, though before that it was a common Thing for an Attorney to deliver in his Bill at the Time pending the Suit. 1 Salk. 86.

King and Hammerton,

The Construction of Submission to Arbitration.

Sittings at Guild-Hall. **I**N Debt upon Bond with Condition for Performance of an Award, the Submission appeared to be of all Matters in Difference to certain Arbitrators. The Chief Justice said, that the Arbitrators were bound to make their Award upon all Matters between the Parties, which had been laid before them, though there was not the general Conclusion of it *Ita quod fiat de omnibus præmissis*. And the Arbitrators having overlooked some Matters that were laid before them in the present Case, the Jury accordingly gave a Verdict for the Defendant, and found, that the Award was void.

Dicks and Sidney.

When an Action is brought for Goods sold and delivered, what shall be good Evidence to support such Action.

Sittings at Guild-Hall. **T**HIS was an Action brought for Goods sold and delivered. The Evidence on the Part of the Plaintiff was, that he sent down certain Parcels of Goods to the Defendant, who was a Country Trader, by the Carrier; that the Defendant took in one of the Parcels, but refused to take the other; and upon that the Carrier was forced to bring them back again, and not knowing who brought them to the Ware-house, the Goods lay there till this Time. And the Defendant gave no Notice of this Refusal to the Plaintiff. The Doubt now was, whether the Acceptance of Part, without giving Notice of the Refusal of the other Part should be taken for Evidence that the Defendant gave an Order for the Whole, till the Defendant should give Evidence to the Contrary. Some of the Jury informed the Court, this was their Notion in Trade that it did so; and the Chief Justice likewise thought it was reasonable. Upon which the Jury gave a Verdict for the Plaintiff.

Paxton and Sharpe.

Sittings at Guild-Hall.

IN an Action for Words the Plaintiff laid in his Declaration, that there was a certain Discourse between the Defendant and some others of one Jenkins's breaking, and upon that the Defendant said of the Plaintiff, he will be the next. Evidence was now given, that by Means of these Words, the Plaintiff had several of his Creditors immediately upon him to demand their Debts; and that he had suffered much in his Trade by this Report. Upon which one of the Counsel objected, that as there was no special Damage laid in the Declaration, this Evidence ought not to be admitted. But the Court said, that a Man's having his Creditors come upon him, and his suffering in his Trade, are only the natural Consequences of a Report of this Nature, and therefore may be well allowed for Evidence in this Action. But then another Objection was made, that the substantial Part of the Words was not literally proved; and the Common Serjeant observed, that though indeed in the Matters of Aggravation, which the Words are said to be attended with, the Courts had not of late gone so far as to keep the Plaintiff up to the Letter of his Declaration; yet he never knew, but in the substantial Part they had. Now in the present Case he observed, that the Declaration had laid the Colloquium to be of Jenkins's breaking, and the Words thereupon were, that the Plaintiff would be the next in a little Time; which was directly admitting that the Plaintiff would break in a little Time; now he observed, that the Evidence only was, that Jenkins was served with an Execution, and upon that the Discourse was, that he was gone off; and thereupon the Defendant said the Plaintiff would be the next; which is, that he would go off next. Now he said a going off or absconding was properly only what would subject a Man to a Statute of Bankruptcy, and not make him a real one; for in order to that a Statute must really be taken out. The Chief Justice accordingly said, that he thought too the Words were not sufficiently proved; and upon that the Plaintiff was nonsuited. Salk. 661. Skin. 333.

When an Action is brought for Words, what shall not be said to be good Evidence to support such Action.

Term. Trin.

2 Geo. II. 1729.

Pit and Lady Claverinith.

How far a
Waggon-
way shall
not be said to
be reserved.

u l. Turnf.
H. 561.

Canc. **O**NE Wray was seised of a Manor in the North, in which there was a great Waste called Tanfield-Moor, and sold it about Thirty Years ago, reserving to himself and his Heirs a convenient Way-Leave, such as he and his Heirs should think proper, for the Carriage of Coals thro' this Waste, from certain Coal-Works of his to the River Tyne. There was an Invention found out about Twenty Years before, which was used pretty much in the North at the Time this Manor was sold, of making Waggon-ways for the more easy Carriage of Coals, which was done by levelling Ground from one Place to another, and then laying Planks into it, for making a more easy and short Conveyance of it. The Defendant was Lessee of some Coal-Works under the Heirs of Wray, and by Virtue of the Power in the Reservation, she made a Waggon-way for her Coals, upon which the Plaintiff preferred his Bill against her. The Chancellor upon hearing of the Cause, made a decretal Order, by which it was referred to the Barons of the Exchequer, to have their Opinion, whether a Waggon-way was within the Reservation of a Way-Leave. Upon this Matter's coming before the Court of Exchequer, the Chief Baron declared, that he had never seen a Waggon-way in the North, and the rest of the Barons owned, that tho' they had seen them, they had very imperfect Notions of what they were; and thereupon they ordered the Plaintiff's Counsel to move the Lord Chancellor, to give them Leave to lay before the Court of Exchequer those Depositions they had made, explaining the Nature of a Waggon-way; for they said, it was impossible for them to give an Opinion upon this Question, till they should have this Evidence before them. This Motion being now made, Lord Chancellor said, that he was afraid, lest by giving this Liberty of seeing what a Waggon-way was, he should give the Court of Exchequer an Opportunity of seeing what this Waggon-way was that had been made; by which Means there might be

Danger of their determining, whether the present Waggon-way, made in the Manner that it was, was within the Reservation; which he said would be against the Design and Meaning of the Reference. He observed too, that it was far from being impracticable for them to determine this Question without this Assistance; for they ought to determine it in the same Manner they would have done, if this Question had fell out in a Cause depending before them. He said farther, for his own Part, he thought it was far from a difficult Question, whether it was less Prejudice to the Soil to make a Way in this Manner, than that such heavy Carriages should be dragged all over the Moor, sometimes in one Part of it, sometimes in another; and this, he said, was all the Point before them. He took Notice too, that it was a Thing, which the Judges were bound to de jure to give their Opinions upon a Case sent to them by this Court. Accordingly his Lordship would do nothing in the Motion. Afterwards the Barons gave their Opinions, that a Waggon-way was not reserved.

Bernado and Duran.

Canc. **A**N Order of Reference had been made to one of the Masters to settle what was due upon the Balance between the Plaintiff and Defendant. The Defendant gave in his Charge, and took out four Summons's to attend the Master, and upon the Bottom of the two last the Master had writ, that he would proceed ex parte, if the Plaintiff would not bring in his Counter-charge. The Plaintiff neglected them all; but yet the Defendant was so fair, as to tell the Master, he consented 2000 l. should be struck off from the Account he brought in, as Allowances for the Counter-charge of the Plaintiff, which he made Oath was all that the Plaintiff could set up as a Demand against him; and the Master accordingly did allow it, and reported, that upon the Balance thus made up, there was 899 l. due to the Defendant. However Lord Chancellor set this Report aside, but without Costs; for he said, the Master had no Authority to make this Report ex parte, till there was first obtained an Order from the Court to do it.

How far a Master in Chancery cannot make a Report ex parte till he has Leave given him by the Court to do so.

Drake

Drake and his Wife and Crisp *ver.* Hopkins.

When a Tender is made, who shall have the Benefit of it.

THE Defendant had entered into Articles of Agreement with the Ancestor of the Plaintiffs, for the Purchase of an Estate in December, 1719. A Mortgage of 6000*l.* being discovered upon it soon after; the Defendant tendered him the Money with Interest in May 1720. which the Mortgagee did not accept till May 1724. And the Estate was not found to be in so good a Condition as was expected. Upon a Bill's being brought however in this Court for a specific Performance of the Agreement, one Question fell into Debate, whether the Interest saved for the four Years by the Tender of the Money due upon the Mortgage, should be for the Benefit of the Plaintiff, or for the Benefit of the Defendant. Another Question was, whether the Defendant should be accountable only for the mean Profits he had received from the Time of the Tender, or for Interest of 5 per Cent. for the Purchase-Money from that Time. The Barons were of Opinion upon the first Question, that he ought to have the Benefit of the A*ff* who did it; and to the second, they thought he could not be accountable for the mean Profits, for that would be contradictory to the Decreeing him a Purchaser from the Time of the Tender; and from that Time he ought to be considered so in Equity; for he actually made Leases of the Land after that, and received the Profits; but they thought the natural Method of charging the Defendant, was to make him account for 5 per Cent. which was the common Interest of Money for most of the Time.

Wilson and Charlesworth.

How far the Court will order a Vacatur to be enter'd upon a Judgment.

THE Plaintiff had recovered in an Assumpsit 12*l.* 10*s.* for Damages, 40*s.* for Costs, and 13*l.* 10*s.* more by Way of incrementum, which in the whole amounted to 28*l.* The Plaintiff afterwards intended to take out Execution, but to her Surprise found, that Satisfaction had been entered upon Record upon a Warrant of Attorney under her own Hand. Upon this she applied to the Court for a Rule upon the Defendant, whom the Warrant of Attorney was supposed to have been given to, and likewise upon two others who were subscribed Witnesses to it, to attend; which accordingly they did. They each of them made express Affidavits, that they saw the Plaintiff subscribe her Name to it, and seal and deliver it as her A*ff* and Deed. But upon Examination of them separately *viva voce*, they contradicted themselves in several material Circumstances; and the Court was satisfied they were concerned in forging this Authority, and in conspiring together to defraud the Plaintiff of her Judgment. Upon which M*rs.* Kettleby prayed, that a Vacatur might be entered upon Record, that the Defendant and these pretended Witnesses might be committed upon the Plaintiff's entering into a Recognisance to prosecute them; and that the Warrant of At-
torney

tozney might be deposited into the Hands of the Officer to be an Evidence against them upon the Trial. The Court said, that since the Plaintiff has offered to be bound in such a Recognisance, they had now no scruple with themselves about committing the Defendant and his Witnesses. Accordingly upon the Plaintiff's entering into such a Recognisance, the Court ordered a Tipstaff to take them; instantly vacated the Entry of Satisfaction with Costs, and ordered the Warrant of Attorney to be delivered into their Officers Hands. Besides the Court observed, that if there was not much Reason to suspect a Fraud of this Sort, they should have thought the Judgment ought to be vacated for another Reason; because the Warrant of Attorney was to enter up Satisfaction in a Judgment of 12 l. 10 s. whereas there really was no such Judgment; for in the Whole the Judgment was for 28 l.

Wynn and —

THE Plaintiff took out a special Latitat in January last, but did not file his Declaration till within four Days before the End of Easter Term. Upon which the Counsel moved for an Imparllance, as the Plaintiff had not made use of his special Latitat as he ought, but delivered his Declaration of a subsequent Term; and by that Means the Latitat was to be considered as a common one. The Court accordingly made a Rule to shew Cause.

What shall not be said to be such a Proceeding by Special Latitat as to hinder the Defendant from having an Imparllance.

Roberts and others ver. Munford.

MR. Reeves came now to shew Cause. But Serjeant Eyres making it appear, that one of the Counts was for so much Money, which the Testator engaged to pay for certain Goods that had been delivered to a Stranger, if the Stranger himself should not pay for them, the Court said that was merely a Promise coming in Aid of the Credit of the other, and therefore was to be considered as a Promise upon the Stranger's Account, and not a Duty of the Testator's own; and therefore it could not be included within the Meaning of the *Ac etiam*; and accordingly granted an Imparllance.

How far a Defendant shall be intitled to an Imparllance.

Brown and Hatch.

Sittings at Guild-Hall. **T**HE Plaintiff brought his Action upon a Special Agreement entered into by the Defendant, whose Brother was in Execution in the Fleet for Running of Goods. The Agreement given in Evidence upon the opening of the Cause was only verbal, that the Plaintiff should endeavour to procure the Defendant's Brother a Par-don, and that in Consideration of this the Defendant should give the Plaintiff 1000 l. if he succeeded, and what his Labour was worth if he should not. The Defendant upon this pro-

When an Action is brought upon a Special Agreement, how far the Evidence shall be said to support it.

duced a Bond of 2000 l. in Evidence, with Condition that the Defendant should give the Plaintiff and one Mrs. Hattenville 1000 l. if the Pardon should be procured in six Months. This Bond indeed was since cancelled; but the Counsel said it drowned the first Agreement; and an Agreement is in its own Nature a Thing Intire, and therefore it shall not be intended, that one Part of it was put into Writing, and the other not. The Plaintiff however desired to give farther Evidence that the Intent of the Bond was only to reduce one Part of the Agreement into Writing, as it was the Chief, and to bring Mrs. Hattenville to Witness this. The Defendant's Counsel objected against her Evidence as she was one of the Co-obligees, and therefore interested with the Plaintiff. However the Court allowed the Plaintiff to give both these Matters in Evidence.

Myonet and Broome.

How far an Attorney's Clerk may maintain an Action for Business done during his Clerkship.

Sittings in London. **T**HIS was an Action brought by the Plaintiff for Law-charges in Business done when he was Clerk with an Attorney; but there was a Covenant in the Articles, that he should not practise during his Clerkship. Mr. Kettleby objected for the Defendant, that the Service of the Clerk must be for the Benefit of his Master; and therefore that this Action ought to have been brought by the Master only. He said, he thought this to be like another Case very well known, that whatever Money an Apprentice earns of another, that other must be accountable for it to the Master, if the Earning is in the Way of the Trade the Apprentice is bound to; for the Master has a Right to the whole Profit of the Business. In the Course of the Evidence this Objection had been hinted at once or twice before, and then the Chief Justice said, that he thought this Action would lie for the Clerk notwithstanding; and the Master must take his Remedy by Way of Action of Covenant against the Clerk. But Mr. Kettleby's stating the Objection now more fully to the Chief Justice, ordered him to prove what he could. Upon which he produced the Articles, and said, that it would appear by Comparing the Dates of them, and the Time laid in the Declaration when the Service was done, that it was performed during the Clerkship. But the Court would not allow them to be read; because the Articles were not duly proved; for the Witnesses to them were alive, and the Defendant had not taken the proper Means, that might have been used in procuring them to have been subpoena'd; and as those were the proper Persons to prove them, the Chief Justice said, he would not allow others to prove their Hands; but where the proper Witnesses could not be procured. Accordingly a Verdict was given for the Plaintiff.

Bilbey and Lee.

Term. Hill.
1727.

THE Plaintiff had brought his Action as Executor in the Debet & Detinet. Upon which the Defendant demurred generally. But the Court said, this could not be taken Advantage of upon a general Demurrer; as it has been determined before in Lev. 250.

Detinet only, cannot be taken Advantage of upon a general Demurrer.

Boote and his Wife against Cooper.

Term. Trin.
1729.

AN Action of Debt was brought upon a Judgment pending a Writ of Error; and yet the Defendant's Bail had entered into the Rule to surrender the Party or pay the Money, if the Judgment should be affirmed. Upon which Mr. Thede moved to stay the Proceedings. And the Court accordingly granted it; for they said the Proceedings on in a fresh Action were plainly veratious after this Security entered into by the Rule; because if the Judgment should be affirmed, there is immediate Remedy against the Bail upon the Rule. And this was the Intent of the Rule, when it was made in the Case of Arthur and Myre. But the Court refused to grant Costs; because the Proceedings in the Action first were regular.

Anonymus.

Term. Hill.
1728.

MR. Wynn moved, that the Sheriff might mend his Return to a Distringas; because he had returned less Issues upon this, than upon a former. But the Court said, they could not do it, as the Interest of a third Person was concerned; but the proper Method, they said, was to make a Rule upon him to return upon another Distringas double the Issues he had returned upon the former. And Justice Page said, in the Exchequer the Sheriff is not chargeable with these Issues, but the Person distrained.

Feilders ver. The Bishop of Winchester, and others.

Term. Mich.
1729.

Canc. **A** Bill was preferred in this Court to establish a Custom in a certain Manor, where the Plaintiff had Lands. The Bill set forth that there was a Custom Time out of Mind for certain Lands in that Manor, whereof the Lands in Question were Parcel, to be leased out for three Lives, and that so soon as one of the Lives should drop, the then Tenant had a Liberty to add a new Life, compounding for a Fine. The Defendants denied, that there was any such Custom. Upon the Hearing of the Cause the Plaintiff read several Depositions; but in all of them it appeared, that it was

How far Depositions in one Cause cannot be read in another without producing an Order for that Purpose.

was Part of the Custom, that the Tenant should put in this Claim within the Three next Courts after the Determination of the first Life. Upon which the Lord Chancellor said, that the Custom appearing upon the Evidence materially differed from the Custom set forth in the Bill, and therefore he could not decree for the Plaintiff. He said, this was not like the Case, where a Right of Common is claimed, and Issue is joined, whether there is a Right or not; there indeed he did allow, if Evidence was given of a Right of Common, paying a certain Rent, that Evidence would maintain the Issue; for a Right of Common is proved. But here, he said, the Question was, whether there was such a Custom as the Plaintiff makes Title under, and no such Custom is proved; but one very differently described. There was another Rule of Evidence, mentioned in this Cause, and that happened upon the Defendant's Counsel offering to read a Deposition of one of the Plaintiff's Witnesses taken in another Cause contradicting a Deposition made by the same Witness in this Cause. But Mr. Lutwyche objected against the Reading of it, unless they could produce an Order of Court which they had obtained before for the doing of it; for, he said, it was a Rule in this Court, never to read Depositions taken in another Cause, without express Leave obtained before for the doing of it. Lord Chancellor allowed, that in general that Rule was unquestionably Right; but he said, the End of Reading this Deposition would only go to the Credit of the Witness; and in such Case he had known it often allowed; which he accordingly did in this Case. But upon the Matter before-mentioned the Bill was dismissed. 1 Vern. 53.

Term. Paschæ

3 Geo. II. 1730.

Tully and Sparks.

A Rule had been obtained last Term by Mr. Harper, to Vide 110.
 shew Cause, why a Judgment of this Court, removed up into the Exchequer-Chamber by Writ of Error, should not be amended, by adding the Words *ex assensu Querentis* to the Costs and Damages. Mr. Jolling coming now to shew Cause, he relied upon two Points; one, that the Record itself, on which the Judgment was entered, was removed up into the Exchequer-Chamber; and therefore that this Court had nothing before them to amend; by the other, admitting the Record to be before them, that still a Fault of this Sort was not amendable. In Proof of the first of these Points, he relied upon the Statute of 27 Eliz. which gives the Exchequer-Chamber Jurisdiction; and he said, that Act has provided by express Words, that the Record itself, and not a bare Transcript, shall be removed before the Justices and Barons. The Writ of Error requires the same Thing, and has Words equally expressive as that directed to the Judges of the Common Pleas, which undoubtedly does. To the second Point, he said, that at the Time the Rule was obtained, the Counsel relied upon the Statute of 16 & 17 Car. 2. to support their Motion. But he observed, that that Statute only mentions such particular Faults, where the Costs only are omitted to be given *ex assensu*, and not where the Costs and Damages both are. The Court were of the same Opinion as to the first Point, so far, as that the Record is removed up into the Exchequer-Chamber, and not what is in Consideration of Law a bare Transcript of one; and that the present Case was exactly the same with Writs of Error upon Judgments in the Common Pleas. But yet, they said, the very original Roll, upon which the Judgment is entered, in none of these Cases is removed; which appears from the constant Practice of alledging Diminution. The second Point they said, was a Matter of more Difficulty. The Chief Justice and Judge Reynolds were of Opinion, that the present Case was not within the Relief of this Statute; but Judge Page and Judge Probyn were of Opinion that it was; and within the Meaning of the Proviso, which relates to Costs, as the Damages and Costs both are here equally given by the Court; but at least, that it was with-

Vide post.

in the general Provision of the last Words of this Clause in the Statute, which says, or other Fault of the like Nature. Upon which the Court ordered this second Point to be spoke to again.

The King and Childers.

What shall
not be said
to be a good
Order of
Bastardy.

ON a Rule to shew Cause, why an Order of Sessions, confirming an Order of two Justices for the Relief of a Bastard Child, should not be quashed; Mr. Reeves took an Exception to it, that it was not directly adjudged, that the Child was born in the Parish of Staplehurst, and yet the Order requires the Defendant to pay the Sum of 45 s. to the Churchwardens of that Parish to reimburse them. The Counsel of the other Side answered, that it does sufficiently appear in the Order, that the Child was born there; for it adjudges, that the Defendant should pay this Sum for the Charges the Parish of Staplehurst were at upon Account of the Woman's Lying-in there. And that it need not appear by express Words, they cited the Case out of 1 Ven. 336. But Mr. Reeves said, that it was adjudged in the Case of The King and Godfrey, Trin. 10 Geo. 1. that this must appear by an express Averment. And to the same Purpose he relied upon the Case of the Queen and Lord Altham, 6 Anne. The Court said, that they do not allow of Inferences to give the Justices Jurisdiction, and accordingly quashed both the Orders.

Boston and Forest.

Vide 188.

MR. Strange now moved for the Judgment of the Court. They said, that since this Cause has been depending here, there have been Actions of the same Sort, both in the Common Pleas and Exchequer, wherein this same Point has come in Question; both of which Courts have been of Opinion, that Bail-Bonds may be taken in double the Sum contained in the Act. All the Court, except Judge Page, said, that in their Private Opinion they were not satisfied with the Reasons of these Resolutions; however that there might be a Uniformity in the Judgments, they were willing to give Judgment for the Plaintiff; especially too, because when Actions come here by Original, the Party will have an Opportunity of bringing a Writ of Error immediately in Parliament; and then this Question may be finally settled at less Expence. Accordingly that Judgment was given.

Baynes

Baynes *and* Forest.

MR. Wynn moved to make a Rule absolute for quashing a Scire Facias to revive a Judgment. The Exception he took to it was, that it was returnable coram nobis, without saying ubicunque, or so much as apud West'. The Court said, they thought the coram nobis might supply the ubicunque; but not the other Fault, and accordingly made the Rule absolute. Sid. 80, 81. 1 Ven. 46.

What shall not be said to be a good Scire Facias to revive a Judgment.

'The Mayor of Basingstoke *and* Bonner.

MR. Strange now came to discharge the former Rule. He said, the principal Authority relied on by the other Side, was Long's Case, 2 Mod. 181. but that does not come up to the present one; because there the Defendant was attending the Business of the Court of Common Pleas; and therefore it was an Abuse of the Process of the Court of King's Bench to arrest him. But there is nothing of this in the present Case. For which Reason he insisted, that the Defendant ought to plead his Privilege, and not be discharged in this Summary Way. On the other Side Mr. Abney argued, that it was true indeed where a Matter goes to the Jurisdiction of the Court they will always require a Defendant to plead it, but not so, where a Defendant waives the Benefit of pleading to the Jurisdiction. However the Court were of Opinion, that they ought not to try upon Motion, whether a Defendant is an Attorney of another Court or not; and accordingly discharged their former Rule.

Vide 300.

Anonymus.

MR. Gapper moved for an Information against the Churchwardens of the Parish of Lincanton, for making a false Return to a Mandamus, which required them to make an equal Rate for the Relief of the Poor. And the Court accordingly made a Rule to shew Cause. 6 Mod. 152. Salk. 374.

How far the Court will grant an Information for making an undue Return to a Mandamus. Vide post.

The King *and* Saunders.

ON a Rule to shew Cause, why an Indictment for exercising a Trade contrary to the Statute of 5 Eliz. should not be quashed, the Exception taken by Mr. Strange was, that the Caption of it was wrong, in that the Indictment was said to be taken at the General Quarter Sessions held at Bristol by Adjournment, without saying from whence that Adjournment was; and without that, he said, it does not appear the Sessions was held in right Time; whereas a Statute has provided, that those Sessions shall only be held at particular stated Times. And to

What shall not be a good Caption of an Indictment.

to this Purpose he quoted the Case of The King and Walker, Mich. 10 Geo. 1. where the Caption of an Indiament upon this very Statute was ad Sessionem tent' apud Kendal per Adjournment' without saying from whence, and quashed for this very Reason. He cited likewise the Case of The King and The Inhabitants of the Parish of St. Matthew's, Ipswich, where this same Exception was allowed. The Court were of Opinion, that in Reason there seemed to be a plain Distinction between the present Case and that of St. Matthew's in Ipswich; because that was an Appeal from an Order of Removal; and an Act of Parliament requires, that such Appeal should be at Quarter-Sessions only; but in the present Case the Indiament would have been good, tho' found at a General Sessions only; and such Sessions may be held at any Time. However, because of the Authority of Walker's Case, which was said to have been settled upon Debate, the Court quashed the Indiament in the present Case. Soon after the Case of The King and Fisher came on, and Serjeant Eyres moved to quash this Indiament too, which was upon the same Statute, for the same Exception. The Court had still some Doubts with them upon this Exception; upon which Mr. Fazakerly took another to it, that the Fact charged in the Indiament appeared to have been committed after the first Sessions must have been held, and all Facts must relate to the first Day of the Sessions. But the Court denied this was so, where there was a Day of Adjournment, for there they relate to that Day only. For which Reason, if a Felony happens to be committed after the Assizes begun, the Court will require a special Remonstrandum to be entered, a new Grand-Jury to be sworn, and the Criminal tried that same Assizes. Accordingly they quashed this Indiament likewise.

Cowworth and Throustout.

How far the Court will require a Man to assign his Errors within a certain Time.

IN a Writ of Error quod coram vobis Motion was made, that a Rule might be made upon the Plaintiff in Error, to assign his Errors within a short Day. The Case of Bret and Rigden was cited, where the Court made the same Rule. Accordingly the Court made a Rule, that the Plaintiff should assign his Errors within four Days.

Nipper and Hobbs.

How far a Writ must be Returnable on a Day certain, and not on a common Return Day.

UPON a Writ of Error out of the Common-Pleas, where the Judgment was by Default, Mr. Wynn took an Exception, that the Proceeding was against a Philazer by Bill, and yet the Writ of Enquiry was returnable at a common Return-Day; whereas in these Cases he said, the Returns ought to be at a Day certain. He said, in the Case of Silk and Hill, Pasch. 11 Geo. 1. an Exception of this Sort was taken, and held not to be amendable. The Court said, they would enquire how the Practice was in the Common Pleas; so this Matter stood over.

The

The Archbishop of Armagh and Dr. Whaley *against* The King.

THIS Matter came now before the House of Lords upon a Writ of Error. All the Judges, that were at that Time present, being Ten in Number, together with the Law-Lords, eleven Bishops were of Opinion the Judgment should be affirmed. But the rest of the Lords, being seven in Majority, reversed the Judgment. The single Point went upon was, that the Death of Dr. Drelincourt, being admitted and instituted into this Rectory, barred the King's Turn. And this they thought they were not concluded from determining, notwithstanding the Pleadings. Vide ante 285.

Hatton *and* Hatton.

DR. Sayer now came to discharge the Rule. He cited many Opinions in the Civil Law-Writers, and likewise in Books of Equity to shew, that Executors were only considered as Trustees for the Residuum. But the Court said, however this Notion may have obtained in Chancery, where Executors have had a Legacy left them, yet even there it has not gone so far, where they have had none. However in no Case they said, would this Court suffer the Ecclesiastical Courts to call an Executor to an Account for the Residuum; and before the Statute of Distributions, they would not suffer this even in Case of an Administrator. And that they said, was one chief Occasion of the Statute, as appears by a very long Case at the End of Raymond's Reports. Accordingly they made the Rule absolute. Vide ante 277.

Lewis *and* Bowles.

THIS was a Proceeding by special Latitat upon a Bottom-tree Bond for 30000 l. Mr. Strange moved to have an Imparllance, because the Plaintiff's Writ had not the usual Form de placito quod reddat, &c. He said likewise, that they have joined two Persons as Defendants in this Writ, and yet they are upon intire different Causes of Action. And as a farther Inducement he took Notice, the Sum in Demand was very large; and that the Defendant was very lately come from beyond Sea, so that he had not Time to look into his Accounts, to give an Answer to this Matter. By Way of Answer to these Matters the Court in the first Place said, they knew of no set Form that was necessary. They took Notice farther, that by the ancient Law and Usage of the Court, a Man might always have joined several Defendants in the same Latitat to bring them into Court, tho' he should declare against them in different Suits; and that this new Practice is founded upon the old; and therefore in this Respect the Latitat was right. And to the last Matter they observed, What shall be said to be a good Special Latitat.

erved, there might be the more Danger of the Defendant's going to Sea again. Accordingly refused the Motion.

Anonymus.

How far a Person shall not be intitled to an Imparlanee.

MR. Gapper likewise moved for an Imparlanee; because in the Latitat the Plaintiff had mentioned only one Battery; but in the Declaration he had counted of Eleven. The Court said, they would intend them one and the same, tho' laid over different Ways; and therefore refused the Motion. But they said, this was more clear, because he allowed the Batteries were laid upon one and the same Day.

Anonymus.

The Certainty required in an Affidavit concerning the Delivery of a Declaration in Ejectment.

IN a Motion for Judgment in Ejectment the Plaintiff produced an Affidavit, that he had delivered a Copy of the Declaration to him, that was Tenant in Possession, as he was informed and believed. The Court said, this was a Fact in the Plaintiff's own Knowledge, where the Defendant was certainly in Possession; and therefore required a positive Affidavit.

Mynyard and Seymour.

The Time which a Person shall be required to make a Return in a Certiorari.

UPON a Writ of Error on a Judgment in the Court of Marlborough, and the general Errors assigned, Motion was made for Time to return the Certiorari, till the next Court, which would be held on Wednesday; and none had yet been holden since the Certiorari went down. The Court said, this Certiorari might well be returned without holding a Court; and accordingly refused the Motion.

Lewis and Lewis.

Vide ante 221.

THIS Matter coming on again to be argued, the Court continued clearly of their former Opinion upon the first Point; but upon the Second they all were now of a different one. And accordingly pronounced Judgment Nisi.

Anonymus.

How far the Court will grant an Information against a Person for making a false Certificate.

MR. Abney moved for an Information against one Draper for procuring a Certificate to be made of his Wife's being alive, tho' she was in Fact dead, in Order to receive half a Year's Annuity supposed to be due at the Exchequer. Accordingly as this was a Cheat of a Publick Nature, the Court made a Rule to shew Cause. And afterwards it was made absolute.

Taylor and —

IN an Action of Debt brought by an Assignee of the Reversion, the Plaintiff had omitted to set forth in his Declaration, that the Assignment was made de Præmissis; and had only declared of an Assignment generally; to this there had been a Demurrer, and a Concilium made up. Serjeant Girdler now came, and moved to have Liberty to amend the Declaration in this Respect, and the other Side consented to it. But the Court ordered the Rule expressly to be drawn up by Consent, and not otherwise; for they thought it an Amendment in Substance.

Now far the Court will not allow an Amendment of a Declaration, unless the other Side consents to it.

The King and Bryan.

MR. Reeves and Serjeant Darnel now came to shew Cause. To the Authorities cited, they said, that three indeed were mentioned upon the former Argument; but one and the same Case is reported in two of the Books; so that in Fact there were but two Authorities. And besides they observed, that the principal Case, reported in two of the Books could not be Law; for there this Notion is carried so far, as not to be an Offence indictable, tho' the Goods are actually delivered. But besides, they said, admitting that Case might be Law, yet there is a Remedy undoubtedly by Action; whereas in the present Case there is none. They farther took Notice, that the present Fraud that was carried on, was upon a Tradesman; and that they submitted it was a farther Argument in their Favour; because the Publick was by this Means concerned. The Chief Justice said for his Part, he thought, the Case, which is reported in those two Books, could not be Law; but tho' it might not be Law in the general Manner, as laid down, yet still it was a good Authority at least for the present Opinion. And he thought he said, the Case, the Counsel of the other Side would have made of it, was a very strange one; that true indeed it shall not be indictable, where the Goods are received, but it shall, where they are not. He said farther, that this being in the Case of a Tradesman, could make no difference in Point of Law, tho' it might make the Case a little more compassionate. Accordingly the Court arrested the Judgment. Lev. 146.

Vide ante 298.

Anonymus.

MR. Kettleby moved in a Complaint between one Allen and his Clerk, that Mr. Allen might refund so much of the Money, as he had received with his Clerk, as the Court should think proper. But the Court said in these Cases, the proper Motion is to have it referred to the Master, to see what he thinks proper should be refunded; and so they made the same Rule in Shaler's Case, which accordingly was done here.

The Remedies which are proper to be taken in Disputes arising between Attornies and their Clerks.

Balaam

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The Remedies which are proper to be taken in Disputes arising between Attornies and their Clerks.

Balaam

Balaam and Mathews.

How far a
Person shall
be allowed to
conclude to
the Country.

IN an Action upon a Promissory Note for 30l. the Defendant pleaded, that the Money was lent upon a usurious Contract, whereby it was agreed, that the Defendant should pay 45 s. for the Use of this Money for three Months, and that he should give a Note for the same. To this the Plaintiff replies, that the Contract was fair and just absque hoc, that he has agreed that he should receive 45 s. for the said Interest & hoc petit quod inquiretur per patriam; to which there was a Demurrer; and the Cause shewn, that the Traverse should have concluded with an Averment. To support this Demurrer Mr. Taylor argued, that it is a general Rule in pleading, that every Traverse must conclude with a hoc paratus; and he said, there was no Occasion to produce Authority to support this. He took Notice farther, that the Replication was Wrong in another Respect; that the Plaintiff had traversed the Agreements being, that he should receive 45 s. without saying modo & forma; so by this Means the Defendant was tied up to prove the particular Sum; whereas any Sum above the statutable Interest would have done as well for the Defendant. To this Purpose he applied the Case of Coleman and Stockden, Hill. 8 Geo. 1. there an Action was brought upon a Bond for a very great Sum of Money; the Defendant pleads, that 1500l. Part of the Money was won at Gaming, the Plaintiff replies that that Sum of 1500l. was not, and concludes to the Country. To this Replication there was a Demurrer, and the Replication held bad for this very Exception. On the other Side Mr. Benny insisted, that this Traverse puts the whole Matter in Issue, and whenever it does so, the Party may conclude to the Country; for in Fact it is a complete Negative to the Defendant's Affirmative, and so a good Issue. To this Purpose he cited a Case out of Salk. 4. in point. And in Lutwyche 1459. this is carried so far, as to make it a good Issue even where the Traverse is Special. For there an Action of False Imprisonment was brought against a Bailiff, who justified by a Warrant from the Sheriff; the Plaintiff replies, that the Defendant imprisoned him de injuria sua propria absque tali warranto, & hoc petit quod inquiretur per Patriam. To this there was a Demurrer and the Issue held good. To the second Point, he said, that the Defendant had set forth a special Agreement; which he would have been obliged strictly to have proved upon Evidence, and consequently the Traverse was right in this Respect. Which Reason, he observed, distinguished this Case from that cited on the other Side; for there if any Part of that Sum, above 100l. had been proved to have been won at Play upon Evidence, that Evidence would have maintained the Issue; as bringing the Case within the Statute, there being no special Agreement. He then took an Exception to the Form of the Defendant's Plea, that the Statute of Ann. which this Action was founded upon, says, that whoever shall agree to give above 5 per Cent. from such

such a Day, the Contract shall be void. Now the pleading ought to have been, that after this Day, scilicet on the Day mentioned in the Plea, this usurious Contract was. To this Purpose, he cited several Entries, and particularly out of 1 Brown 204. Whereas the Defendant has pleaded only, that on that particular Day it was so agreed. To this last Observation nothing was said. To the second the Court was of Opinion the Traverse was good. But to the first, the Court thought this Matter pretty doubtful. They said, they could see no sensible Distinction between its being a special Traverse and a general one. And as there are two express Authorities that this pleading is good, they did not see, but though the Note for 45 s. is not traversed, the Conclusion to the Country might be right. However this Matter stood over.

Vide post

Holt and Ward.

THIS Matter now came on upon a Demurrer to the Plea of Infancy. Serjeant Chappel argued, that the Plaintiff could not take Advantage upon this Promise, and cited a Case out of Carter 233. where it is held, that though there be Remedy in the Ecclesiastical Courts to enforce the Promise of Marriage on the Infant's Part, yet that will not be a sufficient Consideration for the Temporal Courts to make the Promise obligatory. But however, he said, that might be a Matter more proper to be argued by the Civil Lawyers, whether their Law will enforce such Promises or not. Judge Page said, that he doubted very much, whether their Law could enforce them, and said, he thought he remembered a Case, where the Distinction was taken between Contracts per Verba de presenti, and Contracts per Verba de futuro, that those of the first Sort they may enforce, those of the second Sort they cannot. If this was so the Court agreed, there would be an End of the Question. But if it was not, and the Ecclesiastical Courts would enforce the one Sort as well as the other, they all then declared their Opinion to be, that here would be a good Remedy, and this notwithstanding the Authority of the Case cited. Several Cases however were cited by M. Strange, and particularly out of 1 Mod. 25. and 1 Sid. 32. to shew, that in general, Infants may take Advantage of Contracts made with them; but Serjeant Chappel gave them this general Answer, that they are all, where the Consideration is executed. This Matter was accordingly ordered to be spoke to again.

Vide ante *P.C.* 277.

Vide post. 2. vol. 12.

173. 176.

Sweetapple and Goodfellow.

How far a Person can-
not take out
a Capias a-
gainst the
Principal
pending a
Writ of Er-
ror, in order
to charge the
Bail.

ON Rule to shew Cause, why Proceedings against Bail should not be staid, for the Capias being taken out against the Principal, and Non est inventus returned after Writ of Error brought, Mr. Kettleby said; that he submitted a Capias might be taken out for this particular Purpose, because the Bail cannot be charged without it; and he observed, that the Proceedings against the Bail is a Suit intirely different from the Proceedings against the Principal. He said it was constantly practised to proceed in such collateral Action, notwithstanding an Injunction to stay Proceedings in the original One; and he thought a Writ of Error did not differ in this Respect. The Chief Justice owned, that he thought there was a Case about 4 Ann. in this Court, the Name of it was Perkins and Woolaston, where a Motion of this Sort was made; and yet such Proceeding held to be regular. However because he could not think such Opinion could be maintained for Law, he agreed with the Rest of the Court, that the Rule should be made absolute; which accordingly was so done.

Everard and Needen.

How far the
Court will
allow of an
Amendment
after a Writ
of Error.

IN a Writ of Error out of the Common Pleas, Mr. Strange moved to amend their Declaration, there being a general Memorandum, and yet the Cause of Action appearing to have arose after the Term began. The Terms upon which he made this Motion were, that if the Plaintiff in Error should upon this not proceed, they might pay him Costs; if he should proceed, they might not. And these Terms, he said, have been allowed in a former Case, which the Court granted; but said, there must be a Bill filed to warrant the Amendment.

Short and Scurry.

Vide ante
156.

THE Plaintiff's Writ of Execution having been set aside and a Rule made for Restitution, the Plaintiff offered to give the Defendant Restitution in pursuance of it; but however the Defendant would not then accept of it, and upon that the Plaintiff took out a new Writ of Execution, and got a Return made accordingly. However the Defendant had obtained a Rule to shew Cause for an Attachment, but upon the Matter thus appearing to be only a Contrivance of the Defendant to defeat the Plaintiff of having a quiet Possession, the Court discharged the Rule with Costs.

Tulley and Sparks.

THIS Matter now came on to be argued again. The Form of the Judgment as entred upon Record was, Vide ante 110.
 Ideo consideratum est, quod querens recuperet debitum prædictum, necnon How far a Judgment may be amended.
 viginti & duas libras, quas sustinuit tam occasione dilationis debiti prædicti quam pro custagiis nunc hic adjudicat. The Amendment prayed was, that the Words ex assensu Querentis might be inserted between the Words nunc hic and adjudicat. The Chief Justice, now, as well as Judge Reynolds upon the former Argument declared, they thought the Defendant could not take Advantage of this Error, and therefore that the Amendment was unnecessary; but however the whole Court now in general agreed that the Amendment should be made, and gave Rule accordingly.

The King and Herle.

MOTION was made for an Attachment against a Prosecutor for Non-payment of Costs for not going on to Trial to an Executor of a Person indicted, in pursuance of a Rule made, when the Person indicted was living. The Court said, they could not yet grant that Motion, because none has been before made on Behalf of the Executor; however they made a Rule upon the Prosecutor to shew Cause, why he should not pay the Money. And then, they said, they must see the Probate of the Will. How far Costs shall be paid to an Executor.

Wilcox and Huggins.

IN an Action upon a Promissory Note, brought by the Plaintiff as Executor of an Executor, the Defendant pleaded the Statute of Limitations. The Plaintiff replies that within the 6 Years, viz. in Trin. 11 Geo. 1. the Executor took out a Latitat, upon which a Non misit breve was entred, and Continuances made till her Death, which was in 1725. and that afterwards some Time in this last Year he himself took out another Latitat. To this the Defendant demurs generally. Mr. Reeves now endeavoured to support the Plaintiff's Replication. He said he should submit it, that whenever a Person enters an Action within the Time provided by the Statute of Limitations, that of itself prevents the Effect of the Statute at all Times after. And in the Argument of the Case of Kinslay and Hayward, Lutwyche 256. Lord Chief Justice Treby was of that Opinion. He said besides, that the first Executor could not have continued this Suit farther by Journeys Accounts; because that will not lie, where there is only one Plaintiff and one Defendant, and the Death of the Party abates it. So that, he said, unless what has been done be allowed to be sufficient, the Plaintiff must lose a just Debt, and that merely by the Act of God. How far the Entering of an Action shall prevent the Effect of the Limitation.
 He

He then took Notice farther, that whenever a Man's self is provided for out of the Statute, it is a general Rule, his Executor must be so too. To which purpose he applied the Case of Hemmings and Holiday, Pasch. 2 Geo. 1. There a Man was beyond Sea at the Time of the Promise made him, and died beyond Sea; held by the Court, that the Executor was not confined to any Time in bringing the Action. The Chief Justice allowed that Case, and said, the Case of Fines goes upon the same Reason. But he said, the Judgment in the Case of Kinsay and Hayward before cited was reversed in this Court, that reversal affirmed in Parliament; which reversal he took to be directly the present Case. However this Matter was ordered to be spoke to again.

Vide post

Loyd and Baldinfton.

What shall
not be said
to be a Dis-
continuance
in Pleading.

IN an Action upon several Promises the Defendant pleads, he was in Custody December 29, 1728, and so would take Advantage of the late Act of Indemnity. The Plaintiff replies, that after the 29th of December 1708. supradict, he had escaped for thirty Days, and so would bring the Defendant within the Exception in the Statute. Upon this here is a general Demurrer. And Exception now taken that there was a Discontinuance, which might be taken Advantage of in this Manner, notwithstanding the Statute for the Amendment of the Law. But the Court thought, that the Word supradict might be well referred to the 29th of December, and so the 1708 surplusage.

Darbey and Reydock.

What shall
shall not be
said to be a
good Decla-
ration in an
Action upon
a Bail-Bond.

IN Debt upon a Bail Bond, the Plaintiff declares that a Process issued out of the Palace Court, and that by Virtue of it the Defendant was arrested in West; upon which the Defendant gave this Bond for his Deliverance. The Defendant pleads the Statute of 23 Hen. 6. and shews many particulars in which the Bond is void by Virtue of it. Upon this the Plaintiff demurs generally. Mr. Benny now took an Exception to the Declaration, that West does not appear to be within the Jurisdiction of the Palace Court, and of Consequence this Bond cannot be taken to be upon that Statute, but at Common Law; and therefore the Plea was not good. To support this Exception he cited Dyer 120. Lutw. 680. The Court seemed to think there was a good deal of Weight in it; and therefore gave Judgment for the Defendant unless Cause the second Day of the next Term. 1 Cro. 309.

Dutton and Staples.

IN an Action upon several Promises, the Plaintiff declared in one Count for 500 l. due on a Promissory Note; and the Defendant pleaded 497 l. 10 s. given in Satisfaction, which the Plaintiff accepted. The Plaintiff replies, and traverses that he received this less Sum in Satisfaction. To which the Defendant demurs. The Exception taken by Mr. Acherley was, that this Traverse was not good, inasmuch as the Defendant's Plea was not the giving a collateral Thing in Satisfaction, but a less Sum in discharge of a greater. If this had been a collateral Matter, he said, he should have admitted, that the Plaintiff has it in his Election to traverse either the giving or receiving in Satisfaction; and so far is the Authority of the Case in Salk. 627. but he submitted it, that Case goes no farther. The Court however thought there was no reasonable Distinction between the Cases. And the Chief Justice said besides, that he thought the Plea itself ill in Substance; because in general a less Sum cannot be pleaded in Satisfaction of a greater. The Defendant's Counsel tho' to this said, that in Assumpsit only Damages were recoverable; and therefore this Plea was good in this Action, as it would have been in Trespass. However Judgment was given for the Plaintiff, Nisi, before the End of the Term.

What shall be said to be a good Plea of an Accord with Satisfaction.

The King and Clendon.

IN an Indictment for an Assault and Battery committed upon Two, Mr. Fazakerly moved in Arrest of Judgment, that here ought to have been several Indictments, as well as in such Case there must have been distinct Actions. The Court accordingly made a Rule to shew Cause; and afterwards made it absolute.

How far different Offences cannot be joined in one Indictment.

Smith and Horner.

A Rule had been obtained by the Plaintiff in Error to quash his own Writ of Error, which was taken out in the Name of himself and another, who were Co-Defendants, in the original Action upon an Affidavit, that the other Defendant died before Verdict. Mr. Reeves moved now to discharge this Rule. And in the first Place, he said, that he never knew Writs of Error quashed, but for Errors appearing on the Face of them. But the present Writ of Error is right upon the Face of it; and yet the Plaintiff in Error would quash his own Writ for Matter dehors, and for such Matter too, which no Body but himself ought to suffer for being mistaken in. But besides, he said, the Party is estopped by his own Writ of Error from taking

How far the Court will quash a Writ of Error.

taking this Exception; for by suing out the Writ of Error in the other's Name as well as his own, he has by that Act averred upon Record, that the other was alive at that Time. He took Notice farther, that this was now a whole Year, since the suing out this Writ, the Plaintiff in Error could not all this Time be driven to assign his Errors, and a Rule actually given to Non pros' him, if he did not assign by such a Day; which Rule could not be obtained, till after Default made upon two Scire Facias's; and yet after this Delay, the Plaintiff now comes to obtain a Favour of the Court. Mr. Fazakerly on the other Side said, that Instances might be produced of the Court's quashing Writs of Error, for Errors not appearing upon the Face of them; to this Purpose he cited the Case of Talloway and Dakey. There were several Plaintiffs in Error, the one died before Assignment of Errors; in which Case the Writ was held to be abated, and the Court quashed it. He said farther, that the Plaintiff in Error had but of late discovered this Mistake, and if the Court would not quash this Writ, and by that Means give the Party Liberty to take out a new One, there was no Way left for taking Advantage of the Error in the Judgment. The Court said, if there was no other Way of the Plaintiff's in Error taking Advantage of this Mistake in the Judgment, they would not help him out in this. But they said there was, and therefore they thought the Writ was properly ordered to be quashed.

The King and Herle.

Vide ante
335.

MR. Filmer now came to New Cause, and said, that the Executor had no Right to these Costs; because they were not taxed in the Life of the Testator. He said, it was a settled Rule on the Civil Side of the Court, that an Executor should not have Costs owing to the Testator, unless they were taxed in the Testator's Life-time; and he submitted it, there was equal Reason, this should be the Practice on the Crown Side. Mr. Fazakerly would have distinguished these two Cases, by saying in the one Costs is Part of the Judgment, not in the other. The Court said, this was the undoubted Practice on the Civil Side, and they did not see, but there was as much Reason, it should be so on the Crown Side, but enlarged the Rule, because the Master of the Crown Side was not in Court. 3 Mod. 282. 3 Lev. 275.

Metscoffen and Gunner.

MR. Draper moved for Leave of the Court to charge a Person with an Action, who was in Custody upon an Attainder on the Black Act, but under a Reprieve. The Court said, if the Party had been only in Custody, upon a bare Indictment, a Judge might grant such Motion at his Chamber. But on the other Hand, they said, if this had been in Case of a common Attainder of Felony, they should have thought even this Court could not grant the Motion; because if they should, it would be an Escape in the Sheriff to transport him. However in the present Case the Chief Justice said, he still did not know, but this Motion might be proper, because the Black Act has saved the Goods to the Party; and for that Reason he thought his Goods might be liable perhaps in this Way. But yet the Court refused to make any Rule upon this Motion. 3 Cro. 214.

When a Person is in Custody for an Attainder of Felony, how far the Court will not allow him to be charged with an Action.

Term.

Term. Trin.

3 Geo. II. 1730.

Bickley and Bickley.

How far the Court will not set aside a Verdict for a Variance between the Record of the Nisi prius, and the Copy of the Issue.

MR. Draper moved to set aside a Verdict for a Variance between the Copy of the Issue, and the Declaration delivered, there being no Defence made at the Trial. The Action was a Quantum meruit for board, and the Variance insisted upon was, that in the Issue it was laid, that the Money was not paid; in the Declaration, that it was paid. But the Court said, that they refused this same Motion last Term; because the Variance was, between the Declaration and the Issue, and not the Nisi prius Roll and the Issue. The Chief Justice said, he took the Reason for this Distinction to be; that the Party had waived this Benefit of a Variance by accepting of the Copy of the Issue. The Case here referred to, was the Case of Bradford and More; the Variance there was, that in the Declaration it was laid, & prædictus Henricus, but in the Copy of the Issue it was laid, & Henricus generally. Mr. Marsh in that Case obtained a Rule to shew Cause, why the Verdict should not be set aside, though the Court inclined against him; and when Mr. Kettleby came to discharge the Rule he mentioned, the Case of Comes and Lord Tankerville, in Point, against Mr. Marsh; and upon that the Motion was there waived upon a Proposal. However in the present Case for another Reason the Court made a Rule to shew Cause.

Dutton and his Wife against Staples.

What shall be a good Declaration on a Note within 3 Ann. c. 9.

IN an Action upon a promissory Note, Mr. Acherley moved in Arrest of Judgment, that the Plaintiff had declared upon the Statute of 3 Ann. c. 9. which provides, that a Man shall have the same Remedy upon a promissory Note, as upon a Bill of Exchange, and therefore he ought to declare in the same Manner upon both. Now in Actions upon Bills of Exchange it has been determined, that it is not enough, barely to set forth, that a Bill of Exchange was drawn, but the Party ought to conclude, & sic indebitatus existens super se assumpsit; so as to

alledge

alledge an exprefs Promise. And for the same Reason he urged, that it is not enough for the Plaintiff to set forth here, that the Defendant fecit notam promissoriam; but he ought to go on and make the same Conclusion, as is aforesaid, otherwise he said, the Issue could only be Non fecit notam promissoriam; and not, Non Assumpsit, as the constant Method in these Cases is. Now in the present Declaration, he said, this Conclusion is wholly omitted. Mr. Lee on the other Side answered, that this very Exception was expressly over-ruled in the Case of Conyers and Lowther. And the Court were of the same Opinion. Judge Page said, that this Matter has been doubted even in the Case of a Bill of Exchange, though now it is settled; but the Reason for that he took to be, that a Bill of Exchange is only an Order upon a third Person to pay; and no exprefs Promise at all; whereas in the present Case there is.

Metscoffen and Gunner.

MR. Wheete now moved this Matter again. He said, the Defendant lay in Custody under a Reprieve, upon Condition he would procure himself to be transported. He took Notice in the first Place, that if this Motion should be granted, and the Sheriff transport him notwithstanding, he would not be answerable in an Action for an Escape. But if there was any Doubt about this Point, the Plaintiff, he said, was willing to enter into a Rule not to charge the Defendant's Person. The Chief Justice said, it was his Opinion, he would be answerable for the Escape; and the entering into such a Rule would not be a legal Bar to the Charging the Defendant's Person. However the Court thought proper to make a Rule to shew Cause, why the Defendant should not be served with a Copy of a Writ; and then upon his not filing Bail, the Plaintiff should have Liberty to file common Bail for him.

Vide ante
339.

Vide post

Cole and Buckland.

MR. Filmer moved to stay Proceedings against the Bail in the original Action after Notice of a Writ of Error allowed, upon entering into the Rule, that was made in the Case of Arthur and Myonet. Mr. Birch objected, that this Motion was now too late; because the second Scire facias was returnable last Day in Easter Term; and therefore as the Bail had certainly been too late to surrender the Principal in discharge of themselves, in Case there had been no Writ of Error; he thought, that there was equal Reason, that the Bail should now be too late to come for this other Favour, when there is a Writ of Error; for the Intent of this Rule of Arthur and Myonet seems only to give the Bail a Power to have the Proceedings against them stayed; as the Principal has a Power to stay Proceedings against himself, upon the Bail's entering into a Rule to do that upon the Affirmance of the Judgment, which at the Time of the Motion by the Rules of the Court they had a Right then

How far the Court will stay Proceedings against Bail after a Writ of Error is brought.

Vide post

to do, which is surrendering the Principal. Mr. Filmer said, that in the Case of Aldridge and Snowden, this Motion was indeed refused after Judgment against the Bail; but he took the Sense of the Court at that Time to have been, that this Motion was proper at any Time before. And upon that the Court made a Rule to shew Cause.

The King and Charlesworth.

Vide ante
319.

THIS was an Information for Forgery of a Judgment; and the Judgment was set out to have been given in Easter Term; whereas upon the Face of it, it appeared to have been given in Hilary, and docketted in Easter Term. Upon which Mr. Lacy moved, that the Information might be amended in this Respect, though the Cause was to come on to Trial this Afternoon. In the Case of The King and Payne about four Years ago, for Printing the True Briton, he remembered a Motion of this Sort was made just before the Cause came on to Trial; and there the Mistake was in certain Variances, that were made in setting out the Libel. The Court said, that small Amendments, not in Substance, they have known frequently, made just before a Cause comes on; so the same has been done at a Judge's Chamber in Vacation, but in the present Case they said the Amendment would be in Substance; altering the Gift of the Information; and therefore they thought it could hardly be done. However, upon Mr. Masterman's saying the Precedents of Amendments of this Sort were very strong, they made a Rule to shew Cause. And because the Trial was to come on this Afternoon, and the other Side would not consent to put it off, the Chief Justice sat as a Judge of Nisi prius as soon as the Court was up; and adjourned that Court immediately to another Day.

Balaam and Matthews.

Vide ante
334.

THIS Matter now came on again. And the Court were full of Opinion, that the Conclusion to the Country was wrong; because the Traverse had an Inducement to it. They said, there were two Ways of Pleading, either to deny directly what the other has said, and then conclude to the Country; or to give some colourable Inducement to the Denial, and then conclude with an Averment. The Chief Justice said, this was a general Principle in Pleading, unless where the Plaintiff replies De injuria sua propria, absque tali causa; and the Reason for that Exception is, that there the Pleading is known to amount to the General Issue. For which Reason, he said, this Exception does not hold even in the Case of a De injuria sua propria, where the Traverse is particular, as Absque tali Warranto. And accordingly in Proof of this general Rule of Pleading; Judge Page cited two Precedents, one in Rastal 689. the other in Liber placitandi 156. where a Pleading is of a usurious Contract, and the Replikation denies it with an Inducement; yet the Conclusion

sion is to the Country. However the Exception to the Defendant's Plea was now more fully set out than it was before; and the Reason given, why the Setting out the Agreement as of such a Day, without saying *post confectiorem Statuti*, was bad, was, because the Party might vary the Date of the Agreement in Evidence, and might upon this Issue prove such Agreement before the Statute. But the Answer to this Exception was given by Mr. Fazakerly; that though the Court would allow the Party upon Evidence to vary from the Date of the Agreement; yet they would not allow him to vary so far, as to give in Evidence an Agreement before the Statute; and the Time when this Statute commenced the Court are bound to take Notice of, because it is a general One. This Observation was allowed for an Answer; and upon that the Plaintiff moved to discontinue, and that without Costs, because she was an Administratrix, which the Court allowed; though Mr. Fazakerly urged, that when an Administratrix comes for a Favour she shall pay Costs.

Tully and Sparks.

MR. Harper now produced the Record removed up into the Exchequer-Chamber, and moved that it might be amended by the Roll of this Court, that had been before amended; which the Court granted. And the Chief Justice said, that the Roll of this Court could not be carried into the Exchequer, to have had the Amendment made there. Vide ante 325.

Bickley and Bickley.

THE Cause, upon which the former Rule was obtained, was, that the Damages were excessive. The Damages given were 300 l. 100 l. per Annum for three Years, only for bare Lodging and Diet for himself without a Servant. The Witnesses indeed did swear the Plaintiff deserved as much; but they were only the Plaintiff's Servants; and therefore not so proper Judges. And upon this Mr. Lee now moved, that the Rule might be absolute. Mr. Marsh on the other Side objected, that the Verdict was exactly according to Evidence; that the Defendant offered no Evidence to lessen the Damages sworn to; and therefore the present Motion was irregular. He said besides, the Defendant had already preferred a Bill in Equity to be relieved against this Verdict; and that was another Reason, why this Court would do nothing in it. The Chief Justice said, if there had been a special Agreement the Servants would have been proper Evidence of that; but he did not think, they were so fit Judges in the present Case. Accordingly the Court granted a new Trial. Vide ante 340.

Wright

Wright and York.

How far a
Person shall
be intitled
to an Im-
parlance.

ON Rule to shew Cause, why a Judgment should not be set aside, that was signed upon the new Rule relating to Cases, where the Cause of Action is set out in the Writ. The Exception taken was, that the Writ was in the Detinet only; but the Declaration in the Debet and Detinet; and therefore by the Rules of the Court they were intitled to an Imparlance. But it was objected by the other Side, that the Defendant had demanded Oyer; and thereby had waived the Benefit of an Imparlance. However the Court said, they knew of no such Rule; and accordingly set the Judgment aside.

Bland and Perry.

After what
Length of
Time bail
may be al-
lowed to sur-
render the
Principal.

What shall
be a good
Scire facias
against Bail.

MR. Harvey moved, that Proceedings upon a Scire facias against Bail might be stayed, upon an Affidavit, that the Bail were served with the Scire facias but the Day before it was returnable, and they surrendered the Principal the Day after the Return. But Mr. Strange on the other Side answered, that the Writ was left in the Office four Days; and upon two Nihilis no other Notice is requisite; but upon Judgment's being against the Principal, the Bail are bound to search. The Court thought this Practice hard; and upon that they inquired of the Master, whether it was constantly observed. The Master reported, that it was; and said, that formerly this used to be more hard upon the Bail; for upon two Nihilis returned, the first and second Scire facias used to be taken out both together; and there was no certain Time for either's Lying in the Office. But now, he said, this is otherwise; and besides, as high as can be, there must be the same Time for the Return of the one Scire facias as the other; the one must be seven the other eight Days, and not one Four and the other Eleven. The Court however declared, that this Practice might be dangerous; and said, it was harder, than where two Nihilis are returned; for there the Party has his Remedy against the Sheriff; but here the Sheriff may execute his Writ on the Day of the Return. They observed farther, that this was more hard in this Court; because the Scire facias's can only go to the Sheriffs of Middlesex, let the Cause of Action arise in any County; but in the Common Pleas they go to the Sheriffs of the proper one. Accordingly the Proceedings were stayed.

The King and Charlesworth.

Vide ante
342.

Serjeant Girdler now came to shew Cause. But upon the Authority of the Case in 3 Lev. 347. the Court made the Rule absolute; and that without Liberty to plead de novo, or giving Costs, as the Prosecutrix sued in forma Pauperis. The Counsel however insisted, that then she should be dispaupered; and likewise that an Affidavit ought to be made, that this Fault was

Vitium

Vitium clerici. The Court said, that where indeed a Pauper countermands Notice of Trial, or is guilty of such other Delay, these have been Instances of his being dispauper'd; but the present Mistake was only an ordinary Fault. And as to the Affidavit, the Rule in the Case of The King and Symonds, 10 Geo. 1. was produced, where an Amendment was made in setting out the Date of an Act of Parliament; and no such Terms as these were required.

The King and Lewis

THE Defendant had obtained a Rule about a Year ago for ^{Vide 166.} a Mandamus, to be directed to certain Justices of Peace, to take his Recognisance upon Articles of the Peace being sworn against him, having at that Time produced an Affidavit of his being very weak and infirm. Mr. Strange moved now, that the Recognisance might be discharged, without making his personal Appearance upon a like Affidavit with the former. And his Motion was allowed.

Cole and Buckland.

THIS Matter coming on again, the Court were of Opinion the Bail were too late for this Motion after the Return of the second Scire facias. They said, in the Case of Aldridge and Snowden, Lord Chief Justice Pratt was indeed of Opinion, that the Bail might come at any Time before Judgment; but the three other Judges at that Time differed with him in Opinion. However Mr. Birch said, that upon the Bail's giving Judgment in the Scire facias, he was willing to consent, that the Execution should be staid, till the Writ of Error was determined. And accordingly those Terms were agreed to. ^{Vide 341.}

Anonymus.

MR. Reeves came to shew Cause, why an Information in the Nature of a Quo Warranto should not go against a Person for exercising the Office of Bridge-Master in the Borough of Bridgenorth. There was a Day appointed by the Charter for the Election of this Officer; and by the Constitution he was to hold this Office for four Years. Upon the Face of the Affidavits, on which the Rule was founded, the Populace had chose this Person without any Colour of Authority. And upon that the Court said, that tho' this Person was Officer de Facto, the Corporation might have went to a new Election the next Charter-Day, without applying to this Court to remove him. Indeed where an Officer has continued for several Years, they allowed this to be otherwise. But as the present Case was, they discharged the Rule.

How far the Court will not grant an Information in Nature of a Quo-Warranto, in order to try the Validity of a Person's Election.

The King *and* Whych.

How far an Affirmation of a Quaker shall not be good Evidence upon an Information.

IN an Information against two Persons for a Misdemeanour, an Affirmation of a Quaker was offered to be read. But the Court observed, that the Affirmation of such Person is never allowed in Evidence in a criminal Prosecution; and therefore refused its being read in this Case.

The King *and* Taylor.

How far the Court will not grant an Information against the Justice of Peace.

ON Rule to shew Cause, why an Information should not go against the Defendant, the Chief Matter of Complaint against him was, for that upon Complaint being made to him, as a Justice of Peace, that a certain Person had stole some Bonds belonging to another as Administratrix, he committed him; whereas it is known Law, that this was not Felony till the late Act of Parliament; and this Offence was before that Act. For which Reason it was said, this Commitment was intirely illegal. The Court however refused to make the Rule absolute, tho' they said, this was certainly a great Misdemeanour in the Justice.

Anonymus.

How far a Plaintiff shall be allowed to sign Judgment, notwithstanding a Plea is put in to his Action.

A Person came and hired Lodgings of another by the Name of John Coke; and in an Action brought for the Money against him by the Name of John Coke, he pleaded quod Edwardus Maxwell qui arrestat' fuit per Nomen Johannis Coke non Assumpsit. Upon which Serjeant Darnel moved, that the Plaintiff might have Liberty to strike out the Name Edward Maxwell, and enter the Plea as the General Issue. Judge Page and Judge Probyn were only in Court. And Judge Page said, that he thought the Plaintiff might sign Judgment; but refused to grant the Motion.

Smith *and* Capt. —

How far the Court will put off a Trial, by Reason of the Absence of a Witness.

ON Motion to put off a Trial for a material Witness being beyond Sea, who was Witness to a Deed, Mr. Bootle, jun. said, that this might be proved by Parity of Hands. The Chief Justice denied it, because the Delivery of a Deed must be proved; and upon that Mr. Bootle said, it was only an ordinary Writing. But the Court said, it was all the same; and upon this the Motion was granted.

The King *and* Stoughton.

IN an Indictment for stopping up a Way, an Exception was taken to it for Uncertainty, in that the Defendant was charged quod unam sepem levavit vel levare causavit; and that he continued the Nuisance for several Months. The Case of The King and Stocker, 5 Mod. 137. was cited in Point; and likewise that of The King and Brereton, Mich. 11 Geo. 1. where libellum scriptum seu scribi causavit was held bad. The Chief Justice said, that he remembered that Case was argued fully; but did not know, that ever final Judgment was given; and was afraid, if that should be allowed, many Judgments would be reversed. However Mr. Masterman said, the Form of these Indictments is only quod libellum scriptum & scribi causavit, and not aut. And Mr. Fazakerly said, that he remembered the pronouncing final Judgment in that Case. The Counsel of the other Side tho' endeavoured to supply the Defect in this Part of the Indictment, by another Part of it; where the Nuisance is laid to be continued. And cited the Case of The King and Ward, where, he said, the Defendant was charged in one Part of the Indictment with forging a Receipt, in the other with publishing it; the Forgery was laid imperfectly; but yet the Court held, he might be convicted for the Publication. The Court said, they did not think, these Cases were alike; because there the Forgery and Publication were laid as distinct Facts in different Parts of the Indictment; but here one Fact is laid only as a Continuance of the other in the same Part of it. However this Matter was ordered to stand over.

What shall
be a good
Indictment
for stopping
of a High-
way.

Mills *and* King.

IN an Action brought by the Plaintiff as Assignee of a Bail-Bond, the Defendant pleaded a frivolous Plea; and upon that there was a Demurrer. Mr. Agar now took an Exception to the Declaration, that the Plaintiff had not set forth the Time, when the Bill of Middlesex, which the Bail-Bond was given upon, was taken out; and he said, these Writs have no Cesse, and therefore the Time for suing it out is necessary to be set out. For by that it would appear, what Time there was for the Return; and if there was a Term intervening, the Writ was a void Writ; and of Consequence the Bail-Bond taken without Authority. The Court said, that the Defendant has pleaded quod bene & verum est, he was arrested by this Writ; which shews, that the Writ was not void; for if it was, he could not have been arrested by it. Besides, they said, if there was such a Fault in the Writ, the Defendant ought to have shewn it in his Plea. Accordingly Judgment was given for the Plaintiff.

What shall
be a good
Declaration
in Actions
upon a Bail-
Bond.

Benson and Olive.

How far a Deed may be read in Evidence, by Reason of the Length of Time since it was made, notwithstanding no Proof is given of the Execution of it.

Scac. **U**PON a Re-hearing in a Suit for Tithes, the Defendant relied upon a Discharge under the Statutes for the Dissolution of the Monasteries. Upon Evidence the Plaintiff produced a Decree, made in Charles II's Time in this very Court, whereby the Right to the Tithes of these Lands was established. The Counsel of the other Side opposed the reading this Decree, till the Plaintiff should prove, that the Defendant claimed under the Parties privy to this Decree. And the whole Court was unanimous in this Opinion. Accordingly upon the Plaintiff's not being able to give this Evidence, the Decree was not allowed to be read. Afterwards in the Course of the Evidence, a Deed was offered to be produced, that bore Date thirty-eight Years ago, and that of itself, without proving the Witnesses to it were dead. Baron Carter however was of Opinion, that this Deed should not prove itself, without giving this previous Evidence. But the rest of the Court delivered their Opinions to the contrary. They said it was certain, that according to common Sense and Reason, a Deed may be so old, as such previous Evidence must be unnecessary; and in general they took it, that forty Years was allowed to be the Rule. But however the Courts have never tied themselves up strictly to that Rule; but 39, 38, nay 35, has been allowed the same. And Baron Thompson said, the same Thing holds in a Bond, twenty Years is there the general Rule for Presumption of Payment, but Sixteen has sometimes been admitted. Accordingly this Deed was allowed in Evidence, without proving the Witnesses to be dead.

Holt and Ward.

Vide ante
333.

THIS Question now came on again upon that single Point, whether if Ward had not since been married to another Woman, the Ecclesiastical Courts could have so far enforced this Contract, as to have compelled the Plaintiff to have perfected it, tho' he was under Age at the Time he engaged in it. Dr. Hinchman appeared now for her, and argued, that by their Law he might. He said, it was expressly admitted by the Pleadings, that at the Time of the Contract she was of such an Age, as if the Parties themselves had perfected the Contract, the Contract could never have been dissolved. And farther he laid it down for certain Law, that if the Contract had been per verba de presenti, their Courts would have enforced the Solemnization of it. And a Solemnization of Matrimony he said, was not a Matter of Form only, but so very material, as for Want of it the Bishop must certify the Children to be Bastards. The Method of the Ecclesiastical Courts exacting this Solemnization, he said, must be by excommunicating the Infant, if he disobey'd the Sentence. He went on farther and observ'd, that their Law was equally known and certain, that if the Contract de futuro had been entered into by both Parties, when of full Age, their Courts

Courts would have carried it into Execution. And as this Contract would have been good, if carried into Execution by the Parties themselves, he submitted it there was equal Reason, that their Courts should carry it into Execution under the present Circumstances. The Authority of their Books, he said, was general, that these Contracts might be enforced. And to this Purpose he relied upon Swinburn, Title Espousals, Par. 17. Dr. Sraan on the other Side argued, and said, that he did allow, that if the Contract had been per verba de presenti, the Infant would have been compelled to have solemnized it in the Face of the Church. But said, there was no Instance to be met with in their Law, of a Contract per verba de futuro being carried into Execution by Ecclesiastical Censures, tho' both Parties were even of full Age at the Time of the making it. That there have been many Suits commenced for this Purpose he willingly allowed; but said, those Courts had never interfered farther, than to persuade and advise the Parties to compleat their Engagement. In the very same Paragraph before quoted he observed, the Words of the Author were, monendi potius quam cogendi. In the 100th Canon in 1603, he said, it was expressly provided, that no Children shall contract Marriage under Age, but with the Consent of their Parents. No Consent of this Sort appears in the present Case. And therefore it would be very strange, that such a Contract should be enforced. In the Case of verba de presenti, he said, the Contract itself was absolutely a Marriage de Facto. And therefore it was nothing wonderful, that it should be required to be publickly solemnized. But he took Notice, that it was so contrary to the Nature of Matrimony (which is supposed to be a State of mutual Good-Will and friendly Society) to be carried into Execution by Force; that, if it was so done, he submitted it the Marriage would be null and void. The Court thought there were considerable Doubts of each Side of the Question; so the Matter was *Vide post.* ordered to stand over.

Wilcox and Huggins.

MR. Birch now argued for the Plaintiff, and principally relied *Vide ante* upon the Case in Carth. 355. There an Action was brought 335. by an Administratrix, and the Statute of Limitations pleaded. The Plaintiff replies, that it was true indeed it was above six Years from the Cause of Action; but farther says, that the Intestate died within six Years, and Administration was not committed to the Plaintiff till after; and that from the Time of Administration committed, there was not six Years. To this the Defendant demurred; but the Court gave Judgment for the Plaintiff; and held, that an Administratrix has six Years to commence her Action from the Time of Administration committed, unless the Intestate was himself barred. However the Court said, that they continued of their former Opinion. And the Reason they gave was, that wherever a Person enters an Action to save the Benefit of the Statute of Limitations, his Executor must recently sue out a fresh Writ; or otherwise the

Benefit of the Statute is lost. They said, they were far from thinking, but if there was any lawful Impediment given to the Probate of the Testament, the Executor would have Time given to sue out this Writ as soon as reasonably he could after the Probate. But then they said, this Impediment must certainly be shewn in pleading, which is not done in the present Case. To allow Continuances at all upon these Statutes of Limitations, they observed, was a favourable Construction upon them, tho' they thought a just One. But certainly it must be necessary, that the Whole must appear to be as near as possible a continued Proceeding. When the Party himself dies, the Suit cannot strictly be continued; but yet that Breach must be made up as soon as can be by commencing a fresh Action. Accordingly the Court said, this was settled in the Case of Kemfay and Hayward, mentioned upon the former Argument. Mr. Fazakerly said, the same Point was soon after adjudged in the Case of Best and Bretelon; and afterwards in the Case of Morson and Plucker, Trin. 2 Geo. 1. However the Court ordered this Matter to stand over.

Vide post.

The King and Huggins.

The Consequence of a Prisoner's being retaken upon a fresh Pursuit.

Scac. **I**N an Information brought in the Exchequer against the Defendant for the voluntary Escape of one Boys, who was in Execution for 25000 l. the Defendant pleaded, that he escaped without his Privy, and that he was retaken upon a fresh Pursuit. To which the Attorney General replied, that the Escape was voluntary, absque hoc, that it was without his Privy. Issue being joined upon this Fact, a special Verdict was found, that the Defendant's Turnkey let him escape voluntarily; but that it was without the Privy of the Defendant, and that he was brought into Prison again; and then the Jury make a general Conclusion; that if the Court shall be of Opinion, that a voluntary Escape of the Turnkey is a voluntary Escape of the Jailor, they fined for the King; if not, for the Defendant. Mr. Bootle argued for the King, that this Verdict maintained the Information. He said the Rule, which he should found his Argument upon, was, that the Act of a Servant, when done in that Capacity as a Servant, is always to be imputed the Act of the Master. With this Qualification, he said, all the Cases, which might be objected of the other Side, might be answered. And that the Turnkey was acting in this Capacity as a Servant, he said, was manifest. His Office was to look after the Prisoners, and to have the Custody of them; the Custody of them he then had; and a Breach of his Duty, as having the Custody of them, he was guilty of. The Servant himself could not neither be answerable to the King; the King's Remedy is only against the Principal; and so is the express Authority of 1 Ven. 238. Serjeant Darnel on the other Side argued, and said, he should readily allow, that if fresh Pursuit had not been made, the Jailor himself would have been responsible. But when the Party is taken upon fresh Pursuit, he said, The King had now the same Security for his Debt, as he had before; and therefore,

fore, he submitted it, there was no Reason the Defendant should suffer. He put the Case, that the Jailor and Turnkey were together in Company with the Prisoner; the Prisoner escapes by the Connivance of the Turnkey; but no one surely would think, that the Jailor could not retake him. In Doctor and Student, 237. there is an express Case put, of a Man's being in Custody for Debt and Felony both, and escaping with the Privy of the Turnkey; yet held, that the Jailor himself should be fined; but the Turnkey answerable capitally for the Felony. If this Case was Law, he said, it plainly shewed, that for the same Escape the Turnkey might be answerable, as for a voluntary one; the Jailor, as for a negligent One. And if this Rule would hold in criminal Convictions, he submitted it, there was equal Reason to say it would in Civil Actions. Had the Officer, suffering the Escape, been Deputy to the Jailor instead of Servant, he said, he should have allowed, that no fresh Pursuit could have been material; the whole Office is vested in him, and he it is, whom the Law takes Notice of. But the present Case differed much from that; and there is no Reason to say, that the Servant's Act should be imputed to the Master, unless a Stranger was thereby prejudiced. And to prove this Doctrine expressly, he relied upon the Case in Salk. 441. He then took an Exception to the Information, that by Law it was not maintainable. An Action upon the Case for an Escape, he said, at Common Law was the only Remedy; Debt is given by the Statute of 1 Ric. 2. c. 12. and this Information is only in the Nature of an Action of Debt. But he submitted it, that the King was not within the Provision of that Statute; and this, he said, appeared by the Penning of it. The Court said, that they thought, there were considerable Difficulties attending this Question, but their present Opinion was, that the Defendant was not answerable. That he would have been so, they clearly agreed, if the Prisoner had not been taken again; but as the King had really suffered no Prejudice, they thought it would be hard to make the Defendant answerable. As to the Information itself, the Chief Baron said, it was indeed merely in the Nature of an Action of Debt; but yet he thought it maintainable for the King, not so much upon the Statute of Ric. 2. as upon the Statute 13 Edw. 1. c. 11. However Baron Cummins said, that there was some Difficulty stuck with him upon the finding of the Special Verdict, in that it was not so much as mentioned in the Verdict, that there was a fresh Pursuit and Re-taking; and he doubted at present, whether the general Conclusion could help it. It was said then by the Defendant's Counsel, that this Matter was fully proved upon the Trial, and was proposed to be found by the Jury at that Time; but the Court then said, that it was not material to find it. Upon which the Counsel submitted it, that the Verdict might be amended, if this Exception should be thought material. But Baron Thompson said, that could not be done, unless the Minutes of the Special Verdict would warrant the Amendment. Upon the Whole, the Court thought this Matter proper to be considered of more fully.

Thrust-

Thurstout and Holdfast

How far an
Ejectment
will not lie
in Westmin-
ster-Hall of
Lands in a
County Pa-
latine.

Lady Lawley caused several Declarations in Ejectment to be delivered to the Tenants of Lady Faulconbridge in the County Palatine of Chester. And now before Judgment had been moved for against the Tenant in Possession, Mr. Kettleby moved in Behalf of Lady Faulconbridge, that the Proceedings might be staid, on an Affidavit that the Tenants were all Inhabitants within the County Palatine. He said, if they should enter into the common Rule, they would be prevented from pleading any Matter to the Jurisdiction of the Court; because Defendants are thereby bound to insist only on the Merits. And therefore he did not know any other Way in these feigned Suits, than to move to stay the Proceedings. Mr. Fazakerly opposed the Motion, and said, he apprehended, this Court has Jurisdiction in Ejectments for Lands lying in a County Palatine; where the Parties are not resident within the County Palatine. He allowed, that in all real Actions, where the Proceeding is by Summons on the Land, the Courts at Westminster have no Jurisdiction; because it manifestly appears, the Courts within the County Palatine can do the Party Justice. But he submitted it, where the Proceedings must be against the Person, those Courts have not Jurisdiction, where the Party is not resident therein. And therefore, he said, in Ejectments, where feigned Names are made use of, and there can be no such Persons, inhabiting in the Counties Palatine, or any where else, this Court must have a concurrent Jurisdiction; unless it be laid down for Law, that the Courts at Westminster have no Jurisdiction, where it appears, the Lands lie within a County Palatine. But if that be so, there is no Occasion for an Affidavit to stay the Proceedings; this Matter may as well be taken Advantage of in Arrest of Judgment, or upon a Writ of Error. But that this cannot be done, appears expressly by the Case of Davis and Stringer, Carthew 354. 5 Mod. 113. where it is determined, that it must be pleaded, that the Parties lives within the Jurisdiction. He said too, that it was determined about ten Years ago in the Case of Acton and Tanner upon a Writ of Error in the Exchequer Chamber, that Trespass Quare clausum fregit of Lands in a County Palatine would lie in this Court. And besides this very Action of Ejectment was held to lie in the Exchequer in the Earl of Derby's Case for the Manor of Latham in the County Palatine of Lancaster, which was settled after several Arguments. And it is certain, that if this Court can give Judgment, they can award Execution. For which Reason it is the constant Practice to award Writs of Elegit into a County Palatine on Judgments given in this Court. The Court thought this a Matter of too great Consequence to be determined on a Motion. They said, a Fine or Recovery suffered of Lands in a County Palatine is void; as also every Judgment in a real Action. They did not think, that the Case of the Clausum fregit came up to this Case, because there Damages only are re-

covered

covered, whereas in Ejectment the very Land itself is. And though it has been the Practice to bring Ejectments in the Court of Exchequer; yet perhaps there may be a Difference between the Practice of the two Courts; though they said, at present they could not secupon what Foundation the Practice in the Court of Exchequer was maintained. However that this Matter might come on in a more solemn Manner, they said, the Tenants in Possession might appear and plead, what they thought proper.

The King and The Parish of Lyncanton.

MR. Hussey came now to discharge the Rule. He said in general that it was a pretty extraordinary Method of Proceeding to grant Informations against Church-wardens and Overseers for making unequal Rates. The Parliament, he said, had prescribed an Appeal for the proper Remedy. But besides he observed, that has the present Case was, it was something more particular. An Appeal had actually been to the Justices at the Sessions, and they confirmed the Rate in this very Respect, as thinking it equal; but only ordered certain other Persons to be rated, whose Names had been omitted. The Church-wardens in pursuance of this Order have made a new Rate, in which the Names of those other Persons are inserted; but the Rate in other respects is exactly as it was before; and yet the Church-wardens are here complained against, as having acted criminally. The Court said, that the Rate, that is now made is a new one, from which an Appeal may be by Law; and they thought that the only proper Remedy. Accordingly discharged the former Rule. Vide ante 327.

Everard and Eding.

MR. Amerose came now to shew Cause upon the former Rule, and said, that he hoped the Court would not make it absolute, without giving their Side Liberty to plead de novo in the original Action. However upon their owning, that the Writ of Error was brought merely for the Mistake mentioned before, the Court made the Rule absolute without putting those Terms upon the Defendant. Vide ante 334.

Northey and Sheers

UPON a Reference having been made of an Attorney's Bill to be taxed, the Question was, whether an Attachment should go directly, or only a Rule to shew Cause. Mr. Strange urged, that the Intent of the Parliament was, that an Attachment should go immediately, and compared this to the common Case of Costs. He said too, that upon the late Act of Parliament, which requires a peremptory Mandamus to go forthwith, it has been held, that a Writ of Error shall be no Superseas; and he thought, the present Case was something like that. The Court

How far it is necessary that a Rule should be made to shew Cause before an Attachment can issue.

Court said, that the Words of the Act are, that an Attachment shall go according to the Course of the Court. Now, they said, that in all other Cases, except Costs for not going on to Trial, or such slight Motions, they do make a Rule to shew Cause; and therefore did so in the present Case.

The King and The Inhabitants of Westwell,

How far a Person shall not be said to gain a Settlement by living as a Servant in a Parish.

ON Rule to shew Cause, why an Order of Removal should not be quashed, the Case was specially stated, that A. was hired to live with B. from six Weeks after Michaelmas to Michaelmas following; and before his Time was out he offered to live with B. for another Year from that Michaelmas Day, if he would give him 4*l.* per Annum. But that Proposal not being agreed to, he went away on Michaelmas Day. Three Days after the Master agreed to give him the Money, and then immediately A. entered upon the second Service, and lived with B. till the Michaelmas after. The Justices upon this adjudged A. to have got a good Settlement by this Service. But the Court made the Rule absolute for quashing the Order.

Stonehouse and Mallins.

Within what Time a Retaking must be upon a fresh pursuit.

IN an Action of Debt for an Escape of one Farrar, who was in Execution in the Marshalsea; the Plaintiff declares, that he recovered against him in the Common Pleas, and that he was in Execution upon that Judgment in the Marshalsea; but that the Defendant voluntarily let him escape. The Defendant pleads, that the Escape was involuntary; and that he retook the Prisoner upon fresh Pursuit. Upon this the Plaintiff demurs, and shews for Cause, that the Retaking appeared to be after the Action commenced. Mr. Marsh now argued for the Defendant, and insisted, that there was no certain Time limited by Law for a Retaking upon fresh Pursuit; a reasonable Time is given to the Gaoler; and that reasonable Time must vary according to the Circumstances of each particular Case, which the Court are the proper Judges of. That there was no particular Time prescribed for a Retaking upon fresh Pursuit, provided it was done before the Action brought, was known and certain. In a Case in the Year-Books it is held, that a Retaking upon fresh Pursuit may be made seven Years after the Escape. And he submitted it, that there was no reasonable Distinction between the present Case and that. He then took an Exception to the Action itself, that as it must be taken upon the Defendant's Plea, by Law it would not lie. The Defendant has pleaded, that the Escape was involuntary; the Plaintiff has not traversed this, that therefore must now be taken as for Fact; and the same as it had appeared upon the Plaintiff's own Declaration. Now he said, he should submit it, that upon the Statute of 1 Ric. 2. c. 12. no Action of Debt would lie for an Escape, that was involuntary. And lastly he excepted to the Form of the Declaration, that the Plaintiff had not set forth, that he had recovered in the

Common Pleas per judicium; but only, that he had recovered there generally. And for this he relied upon the Case of Jones and Pope, 1 Sid. 306. in point. To the first of these Objections the Court said, it has been so often resolved, that the Retaking must be before the Action brought, that they would not enter into the Argument of that Point now. The Case in 1 Jones 144. is express, and so is the Case of 2 Cro. 657. The second Objection the Chief Justice said, he thought, there was a good deal of Weight in; but Mr. Reeves, who was of Counsel for the Plaintiff, submitted it, that there was not; because the known Distinction taken is; that an Action upon the Case lies only for Escapes upon mean Process; Debt for Escapes upon Process in Execution. However the Court in general agreed, that as the Plea is bad, this Exception can by no means be taken Advantage of; because the Plaintiff had admitted nothing, as the Matter of the Plea is wrong. And if this had been upon a general Demurrer, they said, it would have been all the same. To the last Exception the Chief Justice said, this same Case of Jones and Pope is reported in 1 Saund. and he did not think, there was such an Exception, as this, there; and the Court in general agreed it could not be Law. Accordingly the Court gave Judgment for the Plaintiff Nisi, before the End of the Term.

Crew and Daniel.

IN Debt upon Bond the Plaintiff declared against the Defendant, as in Custody, upon the Statute of 4 & 5 W. & M. c. 21. but did not set forth in his Declaration, that the Defendant was in Custody at his Suit. And for this Reason there was a general Demurrer to the Declaration. To support this Demurrer Mr. Parker relied upon the Case of Morrice and Watkins, Trin. 9 Geo. 1. in point. But Mr. Robinson on the other Side argued, that there was indeed Rule given that way Nisi in that Case; but afterwards that Rule was discharged; and Judgment given for the Plaintiff. The Chief Justice said, that he thought this Exception was very material; because the Intent of the Statute seems only to be, that a Person should have this Liberty of declaring against another, where he is in Custody at his Suit; and not at the Suit of a third Person. And Judge Page observed, that this must be the Intent of the Parliament; because otherwise a Man would have a Power to declare against another, without ever taking out a Writ against him. And this Method of Proceeding he thought was established as a general one for all the Courts, in Imitation of a Practice something of the same Sort, that was before in this Court. Accordingly notwithstanding the Case cited the Court gave Rule for Judgment against the Plaintiff Nisi on Monday. On which Day Mr. Robinson informed the Court, that he had searched the Record in the Case cited, and shewn it to Mr. Parker, and that Judgment was at last given for the Plaintiff. Accordingly, the Chief Justice absent, the Court gave the same Rule here.

When a Plaintiff declares against a Prisoner in Custody, what shall be a good Declaration of that Sort.

Beech

Beech and Parker.

On what Day
a Writ of
Enquiry is
not proper
to be made
returnable.

UPON Writ of Error on a Judgment by Nil dicit out of the Common Pleas. Exception was taken to the Writ of Enquiry, that it appeared to be returnable a Die Sanctæ Trinitatis in Tres Septimanas, which was on a Sunday, but that it was executed the Day after the Return, which was on the Monday. The Counsel did admit, that Monday was the Day of the Return for the Purpose of the Sheriff's delivering the Writ into Court, but Sunday was to be considered the Day of the Return for all other Purposes. Accordingly the Court reversed the Judgment upon the Authority of the Case of Harvey and Broad, 6 Mod. 148.

Southouse and Newen.

What shall
be said to be
a good Re-
turn in a
Writ of E-
legit.

SErjeant Chappel came to discharge a Rule for quashing a Return to a Writ of Elegit, of there being no Goods nor any Lands. The Exception taken to the Return was, that the Sheriff could not Return no Lands, without taking an Inquest for that Purpose; and therefore it ought to have appeared upon the Return, that there was an Inquest. Serjeant Chappel said, that if there had been Lands, and those Lands to be delivered, he did allow, such Inquest was necessary; because there the Words of the Writ are express, that the Lands should be delivered per Inquisitionem; but where there are no Lands, the Words of the Writ do not at all require this. And in such Case the Writ is only in the Nature of a common Fieri facias; and therefore, he said, as to the Delivery of Goods only upon such Writ, it is never required that there should be an Inquest. Accordingly the Court discharged the Rule.

Metcossen and Gunner.

Vide ante
341.

MOTION was now made to discharge the former Rule, upon Account of its giving the Plaintiff Liberty to charge the Defendant in Custody with a Copy of the Writ. Now according to this Rule the Counsel said, it would be an Escape in the Sheriff to transport the Defendant. The Court said it was not their Intention it should be so. Accordingly discharged that Rule, and ordered the Officer to draw up another Rule in this Form, that the Plaintiff should have Liberty to charge the Defendant, in Custody, with a Copy of a Writ.

Fuller and Jossling.

I T had been moved on Behalf of Mr. Jossling, as Executor, that a Judgment, given upon a Warrant of Attorney by his Testatrix, might be set aside for its being entered up after the Party's Death. Upon a Reference of this Irregularity to the Master he reported the Fact to be that the Attorney had delivered him the Non sum informatus the 16th of April last, the Testatrix died the 18th; and that he signed the Judgment the 22d; all which was done in Easter Term last. And now the Question was, whether this Judgment was regular or not. Mr. Fazakerly argued for the Defendant, and insisted, that by the same Reason, as this Judgment would be good, which was signed two Days after the Party died, this Judgment would have been good, though signed at the End of the Vacation. And he submitted it, that this might be of dangerous Consequence to Executors, for by Payment of Debts due by Bond or simple Contract immediately upon the Death of the Testator, which the respective Creditors would have a right at that Time to have paid them, any Executor might be subject to a Devastavit. And to prevent Mischiefs of this Nature, he said, that Clause in the Statute of Frauds and Perjuries was made, which provides, that Judgments shall have no Relation, but to the Time of the Signing. If that was so, he said, he submitted it, the present Judgment was clearly bad. All Authorities, he observed, in their own Nature determine by the Death of the Party. They are, and must be revocable at any Time during the Life of the Parties; and Death is of it self a constant Revocation. To which Purpose he applied a Case out of 1 Ven. 310. and another out of Salk. 399. But the Court declared their Opinion to be, that all Judgments continued to have relation since the Statute as to the Parties themselves, and their Representatives, in the same Manner, as they did before the Act as to every Body else. And therefore the Inconvenience of a Devastavit, was not to be regarded. Then as to what was observed upon Authorities in general, they said, was not applicable to the present Case of a Warrant of Attorney to confess a Judgment. These, they observed, were Authorities coupled with an Interest, and therefore not to be compared in Reason to naked Powers. For which Reason the Chief Justice said, he thought the Party himself could not revoke it; and that therefore the Death of the Party would not be so far a Revocation in Law, but that the Judgment might be well entered up upon it at any Time before the next Precedent Term. And to this Purpose the Court relied the Case of Oats and Woodward, Salk. 87. as being in Point. However the Court said, they would not give their final Opinion upon this Matter now; but in the mean Time made a Rule upon the Sheriff to deliver over to the Defendant the Goods he had taken in Execution on a Judgment of the Penalty of a Bond, upon the Defendant's bringing into Court what Money the Master should appoint.

Within what Time a Judgment upon a Warrant of Attorney must be entered up.

Vide post.

Fuller and Jossling.

How far a Court of Law does not relieve & gainst Judgments entered upon a Warrant of Attorney, but leaves the Party to take his Remedy in Equity.

MR. Pazakerly moved, that it might be referred to the Master to see what was due upon a Judgment, that had been given upon a Warrant of Attorney, as an Indemnity to two Persons being Security for another upon her taking out Administration to her Husband; and farther prayed, that Execution might be stayed in the Sheriff's Hands in the mean Time. He said, that this Judgment appears to have been confessed upon Terms at the Time of the Confessing it; and whenever the Terms are precedent to the Judgment, he submitted it, this Court will always take Care, that they are complied with; tho' he did allow, that when there is a subsequent Agreement, this Court has no Jurisdiction. And to this Purpose he applied a Case out of Salk. 400. in Point. The Court said, that wherever those Terms are, that the Party shall do one or more determinate Acts, they do indeed refer such Judgments to the Master; but wherever the Terms consist of uncertain Acts, they never do it. Upon which the Counsel then prayed, that it might be referred to the Master to see, whether there was one Penny due; and if it should come out upon the Report, that there was, they would then willingly apply to another Court for Relief; or at least, they hoped, the Money should be stayed in the Sheriff's Hands in the mean Time, till they could have Relief in another Place. But the Court refused to grant this Part of the Motion likewise.

The King and Huggins.

How far the Court will not bail a Man who is indicted for Murder.

THIS was a Special Verdict found upon an Indictment of Murder, and removed up into this Court by Certiorari from the Old Baily. The Indictment charged the Defendant, that he being Warden of the Fleet, and one James Barnes, Servant of the Defendant, and employed by him in the Care of the Prisoners, the said Barnes exiens Persona crudelis Naturæ & immanis Dispositionis, did on the first of November, 12 Geo. 1. makes an Assault on one Edward Arne, then being a Prisoner in the said Prison, & felonice & ex malitia sua præcogitata, did then and there against the Will of the said Arne, convey him into a certain Room in the said Prison, re-enter edificat', and did there detain him for the Space of six Weeks, absque solamine Ignis, nec non sine aliqua Marula, Anglice, a Chamber-Pot, Scaphio, Anglice, a Close-Stool, vel aliqua alia hujusmodi Utenili (Parietibus prædict' Romeæ confect' de lateribus, Anglice Bricks, Cement', Anglice Mortar, valde humidis existentibus, ac Romea prædict' situata existent' super communem suer' Prison' prædict' & juxta locum ubi sordes & Humus Prisonæ prædict', necnon excrementum Prisonariorum prædict' adtunc usualiter posit' fuerunt, ratione quorum Romea prædict' adtunc valde insalubris, & Vita alicujus personæ in eadem detent' valde periculos' extitit). The Indictment farther charged, that the said Barnes and Huggins knew that the Room sic ut præfertur scituat' fuit,

suit, and that the said Arne per duriciem imprisonamenti prædicti, became sick, and languished from the 7th of November to the 31st of December following, and then died. And that the Defendant, existens persona crudelis Naturæ & immanis Dispositionis erga Prisonarios in eadem Prisons diversis diebus & vicibus felonice & ex malitia sua præcogitata fuit præsens, auxilians & manutenens prædictum Edwardum Barnes ad prædictum Edwardum Arne sic ut præferrur felonice murdrand'. To this Indictment the Defendant having pleaded Not guilty, the Jury find a Special Verdict. That the Defendant was created Warden of the Fleet by Letters Patent of the late Queen, and acted as such. That one Tho. Gibbons was appointed his Deputy, and acted as such, and that the said Barnes mentioned in the Indictment, was Servant of the said Gibbons, and employed by him to take Care of the Prisoners. They find, that the said Barnes did detain the said Arne in the said Room absque solamine Ignis, &c. as mentioned in the Indictment. That the said Room was situated in the Manner mentioned in the Indictment, and that the said Defendants knew, that it was so situated. They find, that the Defendant Ad spacium quindecim Dierum ad minus ante obitum prædicti Edwardi Arne knew, that the said Room recenter ædificat' fuisset, quodq; Parietes ejusdem Romæ de lateribus, Anglice Bricks, & Cement' Anglice Mortar, adtunc valde humid' fuerunt, Anglice were damp. They find, that the said Arne, per duriciem Imprisonamenti & Detentionis prædicti, became sick on the 10th of September, and so languished till the 20th of October, and then died. They farther find, that during the said Imprisonment per spacium quindecim dierum ad minus ante mortem prædicti Edwardi Arne Defendens fuit semel præsens apud Romeam prædicta, and saw the said Arne sub duritiem Imprisonamenti prædicti ac adtunc & ibidem seipsum avertit, Anglice turned away, and the said Barnes locked the Door. They find lastly, that the Defendant sometimes acted as Warden, during the Time that Gibbons was his Deputy. But whether upon the whole Matter the Defendant is guilty of the Felony and Murder in the said Indictment they pray the Discretion of the Court. This Matter was now argued at the Bar by Mr. Wills on Behalf of the Crown, and by Serjeant Eyres on Behalf of the Prisoner. Mr. Wills in his Argument endeavoured to shew, that as the Facts are found in the Special Verdict, it appears, that Barnes was guilty of Murder. He had the immediate Care of the Prisoners under his Charge, thro' his Cruelty and Oppression one of them died, and therefore he must be answerable for his Death. The general Rule in the Law-Books, he said, is laid down to be, that whenever a Person does an unlawful Act, and by Means of that the Death of another is occasioned, such Person is answerable capitally for the Murder. In 3 Inst. 56. It is held, that if a Person shoots at a Deer in another's Park, and the Owner is accidentally killed by the Shot, this is Murder. He did allow, that this particular Case is denied to be Law in Hale's Pleas of the Crown; but there is another Case in the same Inst. 57. that never has been denied; and which equally makes for his Purpose. A Man there is supposed to be throwing a Stone over a Wall, as People are walking by from Church, with an Intention

tion only of frightening them; one of the Company is killed there by the Fall of the Stone, this is Murder. In Palmer 545. A Case is put of two Constables in different Parishes disputing about a Bastard Child, which of the Parishes the Child belong to; upon this the Child is thrown backwards and forwards continually from the one Parish to the other, and by these frequent Removals the Child dies, this is held to be Murder in the Constables. In Hale's Pleas of the Crown 53. it is held, that if a Woman carries her Child into an Orchard, and while it is left there a Kite flies by, and kills it, this is Murder in the Mother of the Child. As these Authorities had made this Part of his Argument so clear, he said he would now endeavour to shew, that the Defendant himself must be equally answerable. Upon the Face of the Indictment, he said, the Charge against the one and the other was equally strong; the one is charged with committing the Act of Murder, the other with being present and assisting to it. For which Reason he spent no Time upon this Head; but endeavoured to shew in the last Place, that this must be the same upon the Special Verdict. The Indictment charges, that Barnes confined his Prisoner under such Hardships, as occasioned his Death; the Verdict finds, that the Defendant was present, and saw the Prisoner under these Hardships. It was in the Defendant's Power to have released the Prisoner out of them; it was his peculiar Office and Duty to have done it; and then the Rule of Law and Reason is, that Qui non vetat fieri, quod potest, jubet. Serjeant Eyres on the other Side argued, and said, that he should not dispute, but the Fact found in the Special Verdict was Murder in Barnes; he should not deny neither, but the Fact charged in the Indictment was Murder in the Defendant; but he submitted it, that the Fact found in the Verdict was not. He said, in Special Verdicts nothing must be regarded, but what is found to be fact; and not what is barely Evidence of it. Those Circumstances were proper to be laid before the Jury below to have induced perhaps them in their Consciences to have found the Fact, that the Defendant was assisting to the Death of his Prisoner; but those Circumstances are to be rejected now, and the Court is only to judge upon the Fact, as found by the Jury. In Civil Cases this is frequently said down. Circumstances of Fraud are always rejected out of a Verdict; and the Court only considers, whether Fraud or not is found by the Jury. If there had been Fraud, the Court is to conclude the Jury would have found it; and therefore in the present Case, he said, he should submit it, that if all the particular Circumstances of the Defendant's knowing, that the Chamber was situated over the common Sewer, of his knowing, that the Prisoner was confined without a Chamber-pot or other Convenience, had been found in the Verdict, as well as the other of his knowing the Walls to be damp; yet these Circumstances must be rejected out of the Verdict. But, he said, there was no occasion to rely upon this; those other Circumstances, which are the most material ones, are not found; it is only found, that he knew the Walls were damp; that is but one Part of the Hardship; and therefore no Foundation to say the

the Defendant should be answerable for his Prisoner's Death; who died under the whole Hardship, and not Part of it. The Court were of the same Opinion as to the two first Points, that the Fact found in the Verdict was Murder in Barnes; and the Fact charged in the Indictment, Murder in the Defendant. But before they entered into the principal Question, they had a Doubt, whether there must not go a *Venire de novo* upon the uncertain finding of the Jury, that the Defendant was present *per spacium quindecim Dierum ante mortem* of his Prisoner. They said, the common Sense of those Words was, that he was present there the whole fifteen Days; but they observed, that that could not be the Sense; because it is found in the Verdict immediately afterwards, that the Defendant averted himself, and the Door was lock'd. But the Attorney General to this answered, that there were the Words *Ad minus in*; and then the Meaning of the Sentence is directly fixed, that the Defendant saw his Prisoner at least fifteen Days before his Death. Accordingly the Court thought this a sufficient Answer. But otherwise, they said, the Case of *The King and Keet*, Mich. 1697. was a very material one to shew a *Venire de novo* should go. There the Defendant was indicted for Killing his Servant, who refused sending him the Key of his Garden. It was a Doubt upon that Verdict, whether the Master appeared to have struck the Servant first, or the Servant the Master. The Reason for that Doubt's being thought material was, that there had been formerly an Opinion of eleven Judges against one, that it could not be murder, where the Party deceased struck first. But that Case has since been held otherwise in the Lord Chief Justice Holt's Time. Two Judges however were of Opinion in that Case, that the Facts should be taken in the Order that they were laid in the Indictment, two of a contrary Opinion; but yet they all agreed, a *Venire* should go. To the principal Question then all the Court delivered their present Opinion to be, that the Fact as found in the Verdict was not Murder in the Defendant. They did not declare what their Opinions would have been, if all the Circumstances had been found upon the Defendant; but they thought the *per Duriciem imprisonamenti prædicti* could never include them all. However the Court ordered an *ulterius Concilium* to be entered, and said, that where a Special Verdict is removed from the Old Baily, the usual Method is to take the Opinion of all the Judges; because they are all in the Commission there. The Defendant's Counsel then prayed he might be bailed. They submitted it, that upon these Special Verdicts it is the constant Practice to do it, unless the Court is clear upon the Verdict, that the Defendant is at least guilty of Manslaughter. And this, they said, would be an Answer to the Court's refusing Bail in the Case of *The King and Keet* before-mentioned, and the Case in *Salk. 61*. But the Court said, this Point in the Case of *The King and Keet* was debated solemnly; and there the Court declared their Reason for refusing Bail to be, that the Matter was depending upon a Special Verdict. And for this Reason they refused it in the present Case. The Defendant then desired, he might be turned over from Newgate to the Marshalsea. The Court refused that too, till he produced an Affidavit of his Health

Vide post

Health being endangered by the Closeness of that Prison; but upon his doing that, they did make such Rule; tho' said, he must still be kept under strict Confinement.

Goodman and Goodright.

How far the Court will give a Man Leave to take out Execution pending a Writ of Error.

MR. Reeves moved that the Defendant in Error might have Liberty to take out Execution, one of the Plaintiffs in Error being dead. **M**r. Filmer on the other Side said, that the Defendant in Error must take out a Scire facias, before he can have Execution; and for this Purpose relied upon the Case of Spenser and Woodward, Yelv. 208. The Court said, that they would not now consider that Matter; but made a Rule, that it should be no Contempt in the Defendant to take out Execution, notwithstanding the Writ of Errors. And **M**r. Reeves privately said, that this Case in Yelv. was not Law.

Anonymus.

How far a Non pros' shall be said to be regular.

THE Irregularity of a Non pros' having been referred to the Master, he reported the Fact to be, that the Defendant was taken in Custody upon mean Process; but that he had no Notice of a Declaration within two Terms; and upon that the Defendant signed his Non pros'; tho' in Fact, he said, a Declaration was regularly filed in the Office. The Court said, that if the Party will plead, and by that Means admit Notice, it is certainly good; but otherwise they thought Notice requisite; accordingly granted a Superfedeas; and said, the Non pros' was regular.

How far the Court will not supersede a Writ of Mandamus, but will require a Return to be made to it.

Anonymus.

MOTION was made to supersede a Writ of Mandamus, requiring the Judge of the Prerogative Court to grant Administration, and was founded upon an Affidavit, that Administration was granted before the Writ taken out. But the Court said, this Matter must be returned.

The Duke of Mountague and Burroughs.

When an Action is brought upon a Note of Hand, how far an Injunction is proper to be granted, in Order to stay the Proceedings in it.

Scac. **T**HE Defendant here was Plaintiff in two Actions, one of which was upon a Bond, the other upon a promissory Note. The present Plaintiff had upon this obtained an Injunction, surmising an Account; and now upon Bill and Answer, the Case appeared to be, that some Years ago the Duke gave this Bond to the Defendant, and some Time after, being Colonel of the first Regiment of Dragoons, sold the Agency of this Regiment to the Defendant, but made him find Security to Account with him for some Profits concerning it. Soon after the Duke resigned his Commission, and the Defendant upon

upon this complaining that he must be turned out, the Duke gave him this promissory Note. A Sum of 500 l. was borrowed upon the Credit of it of one Lisle. The Defendant acknowledged in his Answer, that there was this Account, but believed he had fully accounted. But whether upon the whole Matter the Injunction should stay, was the Question. The Chief Baron declared his Opinion to be very clear, that as to the Action upon the Bond, the Injunction ought to be dissolved; because the Matter of Account has no Kind of Relation towards it. As to the Note, he thought that not so plain; because the Note does seem to relate to the same Matter as the Account. The Account related to the Agency; and so does the Note. But yet, he said, as nothing of this appears upon the Face of the Note, and as Money has actually been lent upon it, as being a negotiable one, he inclined to be of Opinion, that the Injunction ought to be dissolved as to this Action too. Baron Carter differed with him in Opinion as to the second Point; but the two other Barons agreed with him in both. However upon the Duke's offering to pay M^r. Lisle his 500 l. upon the Note, the Court ordered the Injunction to stay as to this Action.

The King and Charlesworth.

THE Defendant having been surrendered by his Bail in *Vide ante* 342.
 an Action pending in the Court of Common Pleas, prayed a Habeas Corpus to bring him up, that he might have Liberty to move for a new Trial upon his Information. But the Court said, their Rule is never to grant a Habeas Corpus on the Crown-Side, but where they have something to charge the Party with; now in this Case they had nothing; because the Defendant had in every Thing complied with his Recognisance, and carried the Record down to Trial. In the Civil-Side, they said, they could not grant a Habeas Corpus, unless there is a Cause in Court; and for this Reason they intimated, the Defendant must enter an Action against himself; which accordingly the Defendant did; and the next Day was brought up by Habeas Corpus. And then would have entered into his Exceptions for the new Trial. But the Court said, they believed, by the Rules of the Court this could not be done, till the other Defendant Cox appeared. However, they would consider of this Matter a little longer. And as to the present Defendant's bringing himself by Habeas Corpus in this Way, they said, if it was complained of, that this was only a fictitious Suit, this Practice would not do. And in the Case of Sellers and Bowes, the Chief Justice said, the Court actually entered into this Fact, and upon its appearing to be a feigned Suit, the Court sent the Party back again.

King and The Manucaptors of Seagrave.

When a Scire facias is taken out against Bail, the Time that is requisite that it should lie in the Office.

UPON the Irregularity of a Scire facias against Bail's being referred to the Master, he reported, that a Scire feci was returned upon it; but that it did not lie in the Office four Days before the Return. And whether this was requisite or not, was the Question. Mr. Reeves and Mr. Prime argued, that it was not, and relied upon a Case in Salk. 599. in Point. However the other Side said, they had two Cases directly with them later than this in Salk. one was that of Olgar and Staples, Trin. 1724. the other that of Gilbert and Billingsley. The Master said too, that in the Book of Practice left him by his Father, there is no Distinction between two Nihils and a Scire feci in this Respect; and constant Experience is, that each of the Scire facias's must lie in the Office four Days, where two Nihils are returned. The Court thought this the most reasonable; but however ordered this Matter to be farther inquired into.

Harding and Pitcroft.

How far the Court will not set aside an Award.

MR. Fazakerly moved to set aside an Award, made by three Foremen of a Jury, whereby 50l. was only awarded for Damages and Costs; upon an Affidavit, that two of the Arbitrators declared since the making the Award, that they understood it, that the Attornies of both Sides were each of them to agree about the Costs attending the Suit, and that they only meant such Costs, as the Party was at otherwise. He said besides, that he had known sometimes the Court has ordered Arbitrators to attend. Mr. Justice Page said, that he had known the same Thing, but never, unless the Arbitrators were charged with some ill Practice. However in the present Case the Court said, they thought, this would be a Matter of dangerous Consequence, if they should allow an Award to be overturned for something, which part of the Arbitrators has declared about it. Indeed, they said, if all the Arbitrators would come before the Court, and declare, their Meaning was mistaken in the Drawing up the Award, that might be some Reason for the Court's Interposing.

King and Morrice.

When an Action is brought against a Sheriff for a false Return, what is good Evidence to support such Action.

IN an Action for a false Return, the Plaintiff declared, that he recovered 206l. of Alexander Urket, and that the Sheriff of Middlesex directed his Warrant to the Defendant, as High-Bailiff of Westminster, to levy this Money, which he had recovered of the said Alexander Urket, unde præfat' Alexander convictus est. The Defendant returned upon the Back of the Warrant nulla bona, ultra 1 l. within his Bailiwick. For this false Return the present Action was brought. Upon the Evidence at the Trial this Warrant was produced, but there was a Blank left for the Name

Name of Alexander Urket, so that the Warrant required the Defendant to levy this 206 l. quas Carolus King recuperasset versus nobody, unde convictus est. A Verdict was however given for the Plaintiff, subject to the Opinion of the Court upon this Variance. Mr. Wynn argued that this Variance was material. He said, as this Warrant is, the Defendant would have been punishable if he had levied this Money of Urket's Effects, provided he had had any in his Bailiwick. The Warrant, he said, was illegal upon the Face of it, to require an Officer to levy the Money upon A. which B. has recovered, without saying, that B. has recovered of A. If this was so, he submitted it, the Officer could not be answerable for making this Return, whether the Return be true or false. For that would be to punish an Officer, when he does not execute a Writ, which if he did execute, he would be punishable likewise. Mr. Fazakerly on the other Side argued and said, that if the Name of a Stranger had been filled up in the Blank, he did allow Mr. Wynn's Argument would hold. But as the Warrant now is, he submitted it, it could have no other reasonable Construction, but that the Money was recovered of Urket. And resembled this Case to another, that is well known, of a Grant being made between A. and B. of certain Lands; habendum to B. and his Heirs. This Grant is clearly good; and yet the Lands were not said in the Premises to be granted to B. The Chief Justice did allow this Case; and in the present Case too inclined to think, that the Warrant was good, and would support the Declaration. He said, in the present Case, the Warrant is not set out in hæc verba in the Declaration, only the Substance of it; and he thought, this might be taken to be the plain Substance and Meaning of it. However the Court ordered Copies to be given them of the Warrant and likewise of the Declaration; so this Matter was ordered to stand over. Vide post.

Thrustout and Holdfast.

MR. Kettleby now moved, that the Defendants might have Liberty to plead, that the Tenants in Possession are residing within the County Palatine of Lancaster. He said, this is the constant Method of Pleading, where Lands are ancient Demesne; and therefore, he hoped, it should be allowed in the present Case. This Motion he made a few Days before the End of the Term; and the Reason for his doing it then was; because, he said, on the last Day of the Term it is frequent to move for Judgment in Ejectment; and then they should be too late. Mr. Fazakerly on the other Side insisted, that in Ejectments, according to the new Method of Proceeding, the Defendant can plead nothing, but the General Issue. But if this Matter, which is now desired to be pleaded, was pleaded; he submitted it, it could not be material; because this Court has a concurrent Jurisdiction in these Actions, which he conceived to be but personal. He said, it might be difficult perhaps to bring Cases directly adjudged in this particular Action Vide ante 152.

of an Ejectment. But in the Case of Amner and Acton, Hill. 5 Geo. 1. an Ejectment was actually brought in this Court of Lands lying in a County Palatine; Judgment obtained and executed; and the Parties intirely submitted to it. However the Court declared, that they did not think an Ejectment to be a mere personal Action; accordingly gave the Defendants Leave to plead the Matter they requested. 3 Cro. 854.

Cases ruled at the Summer Assises upon the Norfolk Circuit.

Baxter and Baxter.

When the Statute of Limitations is pleaded in Bar to an Assumpsit, how far Payment may be given in Evidence in support of such Plea.

IN an Action upon the Case the Defendant pleaded the Statute of Limitations; and now offered to give in Evidence, Payment before the six Years begun. Chief Justice Eyres allowed this, and said, that he thought the general Rule was, that as Payment might be given in Evidence upon the General Issue, so it might upon Non Assumpsit infra sex annos. And Mr. Prime observed, that when Motions are made in the King's Bench for Liberty to plead Non Assumpsit and Non Assumpsit infra sex annos, the Court constantly says, they could never see any Reason for them; because what will be Evidence upon one Issue will be Evidence upon the other.

Tong and Harrison.

When an Action is brought by one Person against another for lying with his Wife, what shall be good Evidence to support such Action.

IN an Action of Trespass for Breaking the Plaintiff's House at St. Ives, and Lying with the Plaintiff's Wife there, upon Evidence it appeared, that the Plaintiff's House was at Hertford in this County. Upon which Sergeant Raby objected, that the Plaintiff had failed in his Declaration; and cited the Case of The Queen and Cranage, Salk. 385. He said farther, that the Gift of this Action was the Breaking of the House, and the Lying with the Plaintiff's Wife only added in Aggravation of Damages. And compared this to the Case of Lying with a Man's Maid-Servant, wherein it has been determined, an Action will not lie merely for that, though that Matter may be given in Evidence consequentially. But Mr. Gatwood insisted on the other Hand, that there was a Difference in this Respect between Lying with a Man's Wife, and Lying with a Man's Maid-Servant; and that the Lying with the Plaintiff's Wife was in the present Case the Gift of the Action; and consequently the present Objection not material. Judge Denton too was of the same Opinion. And so this Matter was ruled accordingly.

The King and Morrice.

IN an Indictment upon the Statute of 5 Elizabeth, for exercising the Trade of a Grocer, without having served a legal Apprenticeship; the Defendant offered to give Evidence of his having exercised this Trade for seven Years, as being Matter Tantamount to his having served an Apprenticeship for that Time. Chief Justice Eyres did allow, that the Cases had gone so far, as to allow a Wife's living in the Shop with her Husband for seven Years to be equivalent to an Apprenticeship; but thought the present Case not strong enough to comply with the Meaning of the Statute. Accordingly the Evidence was disallowed.

When a Person is indicted upon the Statute of 5 Eliz. for exercising the Trade without having served an Apprenticeship, how far the Defendant's having in fact exercised the

Trade for seven Years will not be sufficient Evidence to acquit him upon such Indictment.

Durrant and Durrant.

UPON an Issue directed out of Chancery, wherein the Question was, whether a Man was Compos or not at the Time of executing his Will, it was held by the Chief Justice, that it was not necessary; that all the Witnesses to the Will should see it executed. If one of them saw it executed, and the others were present, he said, it would be sufficient.

What shall be a good Execution of a Will within the Statute of Frauds and Perjuries.

Burnet and Coby.

UPON the Trial of the Issue in this Cause, the Question was, what Estate the Words in a Will conveyed, which were these following; I devise my Lands to A. for Life, and after his Decease the Remainder to the Heirs Male of the Body of A. and to the Heirs Male of such Issue Male. The Chief Justice was of Opinion, that they conveyed an Estate-tail to A. and said, that the settled Distinction was, where the Word Heir is in the singular Number, and a Limitation made to the Issue of such Heir, the Word Heir is considered as a Word of Purchase, and a Descriptio Personæ; but wherever the Word Heirs is in the Plural Number, and a Limitation made to the Issue of such Heirs; the Word Heirs is considered as a Word of Descent, and not of Purchase.

What Words in a Will convey an Estate-tail, and not for Life only.

Term.

Term. Mich.

4 Geo. II. 1730.

Chairman and Edwards.

How far
Money can-
not be
brought into
Court in an
Action
founded up-
on a Tort.

IN an Action of Trespas, brought for the mean Profits, after a Recovery in an Ejectment, Mr. Hatfel moved to bring Money into Court, and that it might be struck out of the Declaration. But the Court said, this was an Action founded upon a Tort, and therefore refused the Motion.

Andrews and Dingley.

How far the
Court will
quash a spe-
cial Capias.

Serjeant Darnel moved, that a special Capias might be quashed, for the Cause of Action appearing upon the Face of the Writ to be after the Teste; and likewise for the Writ's being signed by Mr. Ventris, whereas it ought to have been signed, by the Filazer, as the Action was commenced by Original. The Court said, that they thought the second clearly an Objection, and as to the first, they said, there must be a Method of taking Advantage of it; so made a Rule to shew Cause.

Vide post

Palmer and Wadbroke.

How far In-
consistent
Pleas shall
not be allow-
ed of with-
out an Affi-
davit that
one of them
is true.

MR. Robinson moved to plead double in an Action of Trespas, Not guilty, and a special Justification. The Court thought, that as these Pleas were inconsistent, they were not to be allowed; however as the Chief Justice was not in Court, they gave him Liberty to move this Matter again. And then he cited the Case of Smith and Smallwood, Mich. 2 Geo. 2. when this very Motion was allowed. But Mr. Strange on the other Side quoted a great Variety of Cases, where these Motions had been expressly refused; particularly those of Filch and Miller, 11 Anne. Anthony and Williams, Trin. 4 Geo. 1. Allen and Jacobs, Pasch. 7 Geo. 1. Woolly and Somers, Trin. 12 Geo. 1. and Hale and Oaldam the same Term. The Court said, that they believed, they had gone so far as to allow these inconsistent Pleas, where an Executor is concerned, but that too upon an Affidavit. However thought, they never ought to do it otherwise. Accordingly refused the Motion.

Golbeir and Colson.

MR. Strange moved, that the Bail taken by the Sheriff, might have Liberty to enter themselves Bail above, inas-
 much as the Defendant refused to appear himself, or to suffer
 any Body to appear for him. Accordingly the Court allowed
 this; because there appeared to be a plain Design in the Defen-
 dant to charge the Bail. However the Court would not allow
 the Bail to justify themselves; as a Judge had not signed the
 Bail-piece at his Chamber.

How far Bail
 which are
 taken by the
 Sheriff shall
 be at Liberty
 to enter
 themselves
 Bail above.

Andrews and Dingley.

THIS Matter coming on again, the Court declared, that
 the Quashing a Writ was a Matter merely of Favour. Vide ante 368.
 And as to the first Objection, they thought it not sufficient to in-
 duce them to quash the Capias in the present Case; because it
 was agreed on both Sides, that the Party was not arrested up-
 on it, till after the Cause of Action. And farther, they observed,
 that Writs taken out in a Vacation are constantly tested of the
 precedent Term. They said therefore, that the only Method of
 taking Advantage of this Fault, if there was any, must be upon
 Oyer. And there it is necessary, that the Party must appear,
 tho' it must be a Special Appearance only; whereas, in the pre-
 sent Motion it was necessary, that he should not. As to the se-
 cond Objection they said, it received this Answer, that the Writ
 was marked with the Stamp of the Filazer, and that was the
 only material Thing. Accordingly the Court discharged the
 Rule.

Mayle and Brackville.

MR. Marsh moved, that the Nonsuit in this Case might be
 set aside, which was obtained upon a supposed Mistake,
 that the Cause of Action was laid undecimo Regis nunc, whereas
 it was objected at the Trial, that the Cause of Action ought to
 have been laid undecimo Georgii Regis primi. For he said in
 Truth the Action was commenced 12 Geo. 1. And though the
 Record was made up the Third of his present Majesty by the
 Entry being De termino Sanctæ Trinitatis Georgii Regis secundi ter-
 tio; yet the Memorandum was, that the Plaintiff queritur duode-
 cimo of the late King. He said, it was true indeed, that this
 Answer to the Exception was not discovered, till the Nonsuit
 was recorded. But yet it was as true, that it was discovered
 immediately after the Nonsuit was recorded; and upon that the
 Judge ordered the Defendant's Witnesses to be sent for; but
 then truly they were told, that the Witnesses could not be
 found. Upon which he moved, that the Nonsuit might be set
 aside; or at least, that the Court would give small Costs; for
 the Statute of 23 Hen. 8. c. 15. which allows Costs in these
 Cases,

How far the
 Court can-
 not set aside
 a Nonsuit.

Cases, trusts the Court with a Power of giving them according to their Discretion. But the Court were of Opinion, that they had no Authority to set aside a Monuit; and they said, the Court of Common Pleas declared themselves to be of the same Opinion in a Case, that was lately before them. Then as to the second Point, they said, the Courts of Law never moderate or enlarge Costs according to their Discretion, as Courts of Equity do. However they made a Rule for shewing Cause, and then enlarged it. But afterwards they thought proper to discharge it; because the Plaintiff would not consent.

Anonymus.

How far a
Mandamus
lies to grant
Administra-
tion durante
minori æ-
tate.

MR. Reeves moved for a Mandamus to be directed to the Judge of the Prerogative Court to grant Administration to one Smith durante minori ætate of two Children. He said the Case was, that a Man had left these two Children, who were Infants; and that Smith was their Grandfather. Smith had applied for Administration durante minori ætate in the Prerogative Court, and had actually given Security to bring in an Inventory and distribute according to the Statute. The Judge of the Prerogative Court had declared him to be a proper Person; but yet had thought proper to insist, that Smith should give farther Security to divide the Effects in equal Proportions amongst the Creditors. Mr. Reeves submitted it, that these were Terms contrary to Law; and therefore as the Judge of the Prerogative Court had offered to grant Smith Administration, upon his complying with these Terms; he hoped, the Judge should be compelled to grant it without them. The Court declared, that they were apprehensive, the Ecclesiastical Courts had a discretionary Power of granting Administration durante minore ætate, still remaining in them. And therefore they might qualify it, as they thought proper. However the Chief Justice said, his Opinion was, that they might be compelled to grant such Administration to some Body. And as it was a Matter of Difficulty, they made a Rule to shew Cause.

Vide post

— and The Earl of Ferrars.

How far a
Trial at Bar
may be in
an issuable
Term.

ON Motion for a Trial at Bar next Term, though it was an issuable one; the Court said, that Lord Chancellor had declared to them, that if the Court could not dispence with their Rule against trying Causes at the Bar in this Term, he must and would decree the Issue against the Earl pro confesso. And upon that they said, they would dispence with it; which they accordingly did.

Smith and Horner.

ON Rule to shew Cause, why an Execution should not be set aside for its having been executed after Allowance of a Writ of Error; Mr. Reeves said, that the present Writ of Error was void; and consequently could be no Superfedeas. The Fact he said was, that there had been formerly a Writ of Error upon this Judgment in the Common Pleas; but quashed upon the Plaintiff in Error's own Motion. Now he has thought proper to bring another Writ of Error upon the same Judgment, as of a Judgment likewise in that Court; whereas Mr. Reeves insisted, it ought to have been a Writ of Error, quod coram vobis. The Court said, the single Question here was, whether the Record below was transcribed or not, before the Quashing of the first Writ of Error; for if it was, undoubtedly the Writ of Error ought to have been quod coram vobis; as was settled in the Case of Cowper and Ginger in this Court, founded upon the Case of Walber and Stokoe. Upon that the Court thought proper to refer this Fact to be inquired of by the Master.

Vide ante 337.

Dale and Homes.

MR. Robinson moved to set aside a Verdict for a Variance between the Copy of the Issue and the Record of Nisi prius; in that the Venire in the Copy of the Issue was returnable at a Day certain; but the Venire in the Record of Nisi prius was returnable at a general Return-day. He said, that there was likewise another Fault in the Copy of the Issue, in that the Words 'duodecim Jurator' was omitted. And for these Mistakes there was no Defence made at the Trial. Serjeant Chappel on the other Side insisted, that the Venire was no Part of the Issue, nor the Duodecim neither; and therefore as the Defence could not be applied to any Part of these Matters, it could not be material. And to this very Point he quoted an express Case of Bastard and Barclay determined last Term in the Common Pleas. Accordingly the Court discharged the Rule, that they had made for shewing Cause.

How far the Court will not set aside a Verdict for a Variance between the Record of Nisi prius and the Copy of the Issue.

Anonymus.

ONE Mary Harvey being brought up from the Gate-house by Habeas Corpus, it appeared upon the Return, that she had been committed by the Quarter Sessions of Middlesex, for contemptuous Words spoken of the Justices in open Court. And now she moved, that she might either be bailed or discharged, upon account of her having lain in Prison for four Months for this Offence, and a Sessions intervening, where she had made a Submission; but yet the Justices ordered her to be remanded. As to the Matter of Discharging her, the Court said, that they did not know, whether she had lain long enough; and that it was

When a Person is committed for a Contempt, how far the Court will not bail him in such Sort of Cases.

was proper, she should make farther Submission to the Justices. And as to the Bailing, they said, this Commitment was a Conviction, and they had no Power to bail in such Cases. And this Point Judge Lee said, was settled in Yates's Case in the Common Pleas; and Mr. Masterman said, the like was held in the Case of the Town of Queenborough. There appeared then to be three Indiments produced against her, found in this Court; and upon that the Court turned her over to the Marshalsea charged with these likewise.

Belgrave and Thompson.

The Certainty required in declaring in an Action of Trespass.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action of Trespass, Mr. Reeves took an Exception to the Declaration, that it charged the Defendant with taking Quinquaginta pecias Materiæ quadratæ, Anglice Square Timber, which was too uncertain; for Materia signifies any Sort of Matter whatever; and besides there is a proper Latin Word for Timber, which is *Maremium*. He said farther, that it was necessary for the Plaintiff to have set forth, how much of one Sort of Timber the Defendant had taken, and how much of another. And upon these Exceptions he obtained a Rule, that this Matter should be farther considered of. But now Mr. Fazakerly came and cited other Cases, where Declarations have been as loose as the present one, and yet they have been held good. Particularly he mentioned, a Case upon his Motion, where so many Pecias ligni, Anglice Ends of Board was held good; and yet there may be many Sorts of Ends of Boards. Then to the second Exception he said, it was true indeed the Number of Pieces was requisite to be mentioned; but never the Nature of them; for that would make great Prolixity in Pleading. Besides he took Notice, that the Statute for the Amendment of the Law had extended all the Statute of Jeofails after *Merdis* to Judgments by Default; and therefore there could be no Doubt of this Matter at this Day. The Court said, that they had consulted Littleton's Dictionary, and had found Materia to be a proper Word for Timber; and that would put the chief Matter in Dispute beyond Question. And as to the other Matter, they thought it not material; accordingly affirmed the Judgment.

Anonymus.

When a Scire facias is brought against Bail, how far several Pleas may be pleaded by the Defendant without Summons and Severance.

IN a Scire facias against Bail, the Plaintiff had demanded severally of the Bail, why the distinct Sums recovered by the Judgment should not be respectively levied of their Lands and Tenements. And upon this Mr. Draper moved, that the Defendants might have Liberty to plead severally, because several Recoveries are prayed against the Defendants. Accordingly the Court allowed the Motion.

The

The King and Bell.

MR. Fortescue and M^r. Kettleby moved to discharge a Rule, for the Inspection of publick Books in the Corporation of Marlborough. They said, there had only been a Rule made for shewing Cause, why an Information should not be granted against the Defendant for exercising the Office of Burgess in this Borough; so that at present there was no Cause in Court; for the Entering into a Recognisance on the Part of the Prosecutor makes it such a one; and that is never done till the Rule made absolute. They said farther, tho' the Information should be granted; and even there if it appears by the Recognisance, that a common Informer only prosecutes, the Court would never suffer this Motion. M^r. Kettleby said farther, that he did admit, that in some Cases the Court had gone so far, as to grant Rules for these Inspections before making the Rule absolute for the Information; but he remembred particularly in the Dispute between Alderman Brocas and Alderman Baylis, this Motion was expressly refused. He then observed, that the Rule was drawn up in such an expensive Manner in the present Case, as he believed was beyond all Kind of precedent. For it was to have Inspection of all publick Books, Records, Entries and Papers. The Court said in the Case of Bedford Level, the Distinction was settled, between where a common Informer appears to be Prosecutor, and where the Party interested; and they remembred in the present Case, that the Rule for shewing Cause upon the Information was made at the Complaint of a Party interested; then as to the Form of this Rule, M^r. Masterman said, that they have not been of a long Date; but from the Time of their being first granted, they have always been drawn up in this Manner. Accordingly the Court refused the Motion.

At what Time the Court grants their Rules for inspecting Books of a Corporation.

Rixon and Francis.

MR. Agar moved, that the Proceedings against Bail might be stayed on the Scire facias, pending a Writ of Error on the principal Judgment, upon entering into the Rule of Arthur and Myonnet, to surrender the Principal, or pay the Condemnation-money within four Days after the Judgment should be affirmed. M^r. Robinson on the other Side objected, that Judgment was had upon the Scire facias; and therefore this Motion was now too late; and he said, in the Case of Cole and Buckland, this Motion was refused, only because the second Scire facias was returned. The Court said, that was certainly true; but yet they had considered on this Matter, and were resolved to extend this Rule of Arthur and Myonnet to the present Case; only upon this Difference, that as the Bail have not now the Liberty to surrender the Principal; so they shall not have their Election to surrender him, or pay the Condemnation-money, but shall be expressly Bound to pay the Condemnation-money in Case the Judgment be affirmed. And likewise the Court required the Bail should pay the Costs of

How far the Court stays Proceedings against Bail pending a Writ of Error.

of the Scire facias, and the Chief Justice said, that there was Reason to carry these Motions as far as can be; because it is much to be doubted, whether, in Case the principal Judgment be reversed, the Bail may not relieve themselves by an Audita Querela. Accordingly upon Mr. Agar's Consenting to these Terms the Court granted the Motion.

Anonymus.

When a Judgment is set aside, how far the Party need not declare De novo.

A Former Judgment having been set aside for Irregularity, Mr. Umphrevil moved, that a second Judgment might be so likewise, for there having been no new Declaration delivered. But the Court said, the former Judgment might have been set aside for some Irregularity in not calling for a Plea. Accordingly refused the Motion; for, they said, their Rule was, that the Party shall go back and amend no farther than his Irregularity has begun from.

Lopes Henrices *ver.* Frances & Perata.

How far Service upon one Defendant shall not be good Service upon another.

MR. Brown moved, that Service upon one of these Defendants might be Service upon the others, upon Account of their being joint Dealings and Transactions between them. The Court said, where indeed one Defendant leaves the Management of the Cause to the other, Service upon one Defendant is allowed good Service upon the other, by the Practice of Chancery as well as this Court. But in the present Case, the Transactions between one Defendant and the other related to Matters of a different Nature. So refused the Motion.

Worley and Glover.

What shall be said to be a good Service of a Copy of a Writ.

MR. Strange moved to set aside a Judgment that had been obtained on the Proceeding upon the Foot of the late Act of Parliament for discharging the Persons of poor Creditors. He said the Act requires, that the Defendant should be served with a Copy of the Writ; which Service of the Copy must be intended to be made as the Service of the Copies of all other Things are; viz. at the same Time to shew the Party the Original; but in the present Case that was omitted. He said besides that the Copy of the Writ was bad too in Point of Form, upon Account of the Return being prox post septimanas Sancti Mich. without saying how many Weeks; so that the Defendant had as yet Time to appear, and a great Deal longer. The Court were of Opinion as to the first Point, that the Objection was not material; because the Act of Parliament has thought proper to require only a Service of the Copy of a Writ; and with a Copy the Defendant was served. However upon the other Exception the Judgment was referred to the Master.

Anonymus.

PROHIBITION was moved for to be directed to the Consistory Court of York, to stay there Proceedings in a Suit for the Payment of a Rate, upon a Suggestion that the Party's Lands did not lie in that Parish where the Rate was made of; which Matter they had pleaded below; but still the Courts there went on Proceeding; and so would try the Bounds of Parishes. The Court said, that the Party ought not only to have pleaded, that the Lands did not lie within that Parish, but that they lay within some other; for non constat upon this Plea, that the Party has any Lands; and if so, this would be Matter proper for Appeal. However as the Counsel said the Fact was, that the Lands lay in the next adjoining Parish; the Court made a Rule to shew Cause.

How far a Prohibition lies to stay Proceedings in the Ecclesiastical Court in a Suit for the Payment of a Rate.

Vide post.

Black and —

Serjeant Girdler moved to stay Proceedings, which were carried on upon the late Act of Parliament, which allows Service of a Copy of a Writ to be good Service, upon Account of the Copy of the Writ, as well as the Writ itself, being void; there being the material Words left out, si inventus sit in Balliva tua. The Court said, they did not think this would make them void; so refused the Motion.

What shall not be said to be a void Writ.

Mytton and Peacock.

MR. Strange moved for an Imparlance, upon a Proceeding on the new Rule by special Latitat, for the Declaration's being for more than was contained in the Writ; and yet when this Matter had been laid before a Judge, the Plaintiff took out a Summons likewise, and got his Declaration amended. But Mr. Strange submitted it, it was a Declaration within the Rule but from the Time of the Amendment; accordingly the Court made a Rule to shew Cause.

What shall be said to be a good Proceeding by special Latitat.

Winter and Snow.

MOTION was made, that the Plaintiff in this Case might be dispaupered, for his having been nonsuited in a former Action. But because the Nonsuit appeared to be only upon a Slip, the Action being in Trover, and the Demand appearing upon Evidence to be made after the Telle of the Original, tho' in Fact before the suing of it out; the Court discharged the Rule, that had been made for shewing Cause.

When a Person is admitted in forma pauperis, how far the Court will not dispauper him.

Williams.

Williams and Promittee.

The Forms
which are
required in
Judgments.

IN a Writ of Error on a Judgment in the Common Pleas upon an Action of Debt upon a Bond, M^r. Strange took an Exception, that before the pronouncing Judgment, that a Day is given by the Record to the Parties *hic usque in Octabis crastino Purificationis*; and then without saying *Ad quem diem*, &c. Judgment is immediately given with an *Ideo consideratum est*. So that Judgment is pronounced, when the Parties were out of Court upon an Adjournment. The Court said, this was certainly not right; however the Court would not reverse the Judgment, but ordered the Matter to stand over, that the Parties might have Liberty to move below to amend; and afterwards it was amended and the Judgment affirmed.

Mallory and Jenings.

How far the
Want of a
Writ of En-
quiry may
not be assign-
ed for Error.

IN a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon the Case on several Promises, Want of a Writ of Enquiry was assigned for Error; and M^r. Reeves submitted it, that this was an Error not helped by the Statute of Jeofails. He said, the Statute for the Amendment of the Law had helped Judgments by Default in no other Cases, but where Verdicts were aided by the former Statute; but he said, there could be no Writ of Enquiry where there is a Verdict; and therefore as the Want of that could not be intended to be cured in a Judgment by Verdict; so it could not be intended to be cured in a Judgment by Default. But the Chief Justice said, that the Stat. of 18 Eliz. helps the Want of all original and judicial Writs after a Verdict; and therefore by the Statute of the Amendment of the Law, referring to this as well as all other Statutes of Jeofails, this Case must be helped likewise. Besides the Chief Justice said, it is certain Writs of Enquiry may come in Aid of Verdicts in some Cases. And Judge Lee observed, that this very Point in Question was determined in the Case of *Mes and Pit*, Trin. 11 Geo. 1. and in the Case of *Morgan and Houseman*, Pasch. 3 Geo. 1. Accordingly Judgment was affirmed.

Hisham and Rhodes.

How far the
Court will
not proceed
in a summary
Method
against an
Officer of
the Court.

MR. Kettleby moved, that a Bond and Judgment given to the Marshal for the Security of the Rules might be delivered up, upon an Account of the Terms of the Bond and Judgment having been complied with. But the Court said, tho' the Marshal is an Officer of this Court, they should not interfere in a summary Way in a Matter of this Nature, which would be, to try possibly a long Dispute, whether the Terms were broken or not. They compared this Case to that of a Sheriff's taking a Bond, supposed to be against the Stat. of 23 H. 6. which

which Matter, they said, they certainly would not determine upon a Motion.

Speak *ver.* Born, & al'.

DR. Andrews came to shew Cause, why a Prohibition should not be directed to the Commissary of St. Paul's, to stay Proceedings in a Suit depending before him, that was commenced by the present Defendants as Church-wardens of the Parish of St. Giles's Cripplegate, to compel Speak, the Plaintiff here, to take a Licence from the Ordinary, in order to qualify him for acting as Deputy to one M^r. Venn, appointed Clerk according to the Canon. He said, there were two Points, that would properly fall out in this Enquiry; one, whether a Clerk of a Parish can make a Deputy; the other, admitting that he may, whether such Deputy be obliged to take a Licence. To the first of these Points, he said, he should submit it, that a Parish Clerk could not make a Deputy. The Exercise of this Office, he said, related to Matters merely Ecclesiastical, and therefore the Office could only be considered to be Ecclesiastical; especially when such Office is supplied by a Parson, as this Case is. The Consequence of which, he said was, that such Officer could not make a Deputy. For the Rule of the Civil and Canon Law is, that all Persons shall exercise their Offices themselves in proper Person, and not call in Aid the Assistance of another. To the other Point, he said, he did allow that there was no express Canon, which required these Officers, that even act in Person as Parish-Clerks to take a Licence. But the Canons in 1603 do appoint the Bishop to be Præordinator omnium; and the Construction of this Canon has been, that Clerks of Parishes shall be under the Regulation of the Bishop, and shall take Licences. He said then, that as this was reasonable that the Clerks themselves should take Licences, there was equal Reason that their Deputies should do so too. M^r. Reeves on the other Side urged, that this Office was considered in Law, as temporal; and to this Purpose quoted 13 Rep. 70. 18 Edw. 3. 27. Marsh. 101. 1 Keb. 286. And if this Point was so, he said, he should submit it, as one Consequence, that the Clerk might make a Deputy; it is determined that a Constable may, and so of all other Officers, that are ministerial; and as another Consequence, that there is no Occasion for a Licence. The Court said, that they at present inclined to think, that the settled Distinction was, that this Office is considered as temporal, when the Clerk is nominated by the Parish under Custom; but spiritual, when nominated by the Parson, according to the Canon. However the Court thought proper to grant the Prohibition, that the Parties might declare in it; and gave a Week for this Purpose, tho' Serjeant Chappel said, that four Days was the usual Time.

How far the Deputy of a Clerk of a Parish is obliged to take a Licence.

Hanmere and Ellesmere.

How far a
Person shall
gain a Settle-
ment by a
Service.

MR. Fazakerly moved to quash an Order of Removal, wherein the Fact was specially stated, that a Man was hired for three Quarters of a Year, and lived as Servant for that Time in Ellesmere, and then continued on upon another Hiring for a Year, and lived upon that Hiring for one Quarter. But upon this Matter, the Justices adjudged that he gained no Settlement at Ellesmere, so removed him to his former Settlement at Hanmer. He said there were many Cases, where such Hiring and Service has been adjudged a good Settlement. And the Court said, this was not a Matter now proper to be made a Question of; so made a Rule to shew Cause. And afterwards made it absolute.

Williams and Seagrave.

Vide ante
364.

THIS Matter coming on again, Mr. Strange insisted, that there was not only as much Reason that the Scire facias should lie in the Office four Days before the Return, where there is a Return made of Scire feci, as where there is a Return made of two Nihilis; but he submitted it, that the Practice of the Court might be proved to be so. To which Purpose he cited the Case of Obryan and Fraser, Mich. 12 Geo. 1. There the Doubt was, whether the Writ of Scire facias might be executed the Day it was returnable. In that Case, it was held it might; and the Reason for it which he took the Court gave at that Time was, because the Scire facias must lie in the Office four Days. He said too, that this very Reason the Court went upon in the Case of Land and Perry. And besides, he said, they had a Certificate to produce of many of the antientest Practisers, that they always took the Practice to be so. Accordingly the Court made a Rule, that Proceedings upon the Scire facias should be staid.

Mytton and Peacock.

Vide ante
375.

THIS Matter coming on again, Mr. Filmer said, that the established Rule of the Court was, that upon an Amendment the Plaintiff shall have his Election of paying Costs or giving an Imparance; and in this Case the Plaintiff chose rather to pay Costs. But Mr. Fazakerly on the other Side argued, that the Declaration amended was to be considered as the Declaration in the Cause, but from the Time of the Amendment, and as that was after the second general Return-day in the Term, they were therefore intitled to an Imparance by the antient Practice of the Court. But the Court said, it is certain a Declaration amended is considered as the Declaration in the Cause from the Time of the first Delivery; and that that appears from the constant Practice, that if a Declaration is delivered before the Eschew-day of the Term, and afterwards amended, the

the Defendant is obliged to plead the same Term. Accordingly the Court discharged the Rule.

Anonymus.

MR. Waller moved for an Information against one Richards, a Justice of Peace in Wales for a violent Battery. Judge Probyn at first thought it requisite, that there should have been Notice given of the Motion; but as it was a Complaint against the Justice out of the Execution of his Office, the Court thought it not necessary, so made a Rule to shew Cause. Chief Justice and Judge Page absent.

When an Information is moved for against a Justice of Peace, how far Notice need not be given of the Motion.

Anonymus.

MR. Harper moved for an Information against one Winter for a Challenge to fight at Long-Sword, tho' given only by Word of Mouth. And accordingly the Court made a Rule to shew Cause. And some Time before in this Term, Motion was made for an Information against Col. Onslow for a Challenge in Writing. There the Words of the Challenge were inserted in the Affidavit verbatim; but the Court refused to grant a Rule to shew Cause, till the Letter was annexed to the Affidavit.

How far the Court will grant an Information for a Challenge.

Dupleles and Thorp.

ON Rule to shew Cause, why a Venue should not be changed, **M**r. Bootle, jun. said, that the Action was in Debt for Rent, and therefore the Court would not do it. But **M**r. Marsh on the other Side submitted it, that as the Circumstances of this Case were, they would. Because here the Action was brought upon a parol Demise, and not laid in the County where the Lands are. But the Court said, that they thought the Rule in general was, that the Venue is never changed in any Action of Debt for Rent. They appealed too to **M**r. Reeves, whether the Rule was not so; who declared, that so he always understood it. Accordingly they discharged the Rule.

How far the Court does not change the Venue in an Action of Debt for Rent.

Curland and Leeland,

MR. Fazakerly moved to quash an Order of Sessions, confirming an Order of two Justices. The Fact was specially stated upon the Order, that one Somner lived as an Apprentice in the Parish of Curland, and when he had served out good Part of his Time there, entered into an Indenture of Apprenticeship; and then served out the whole of his Time; but it happened, that the Indenture was not stamped, nor the Money due for the

How far a Person shall gain a Settlement by serving an Apprenticeship.

the Stamps ever paid. Upon this Fact so stated, the Justices of the Sessions, which were for the County of Lancaster, ordered the Opinion of the Judge of Assize to be taken; and accordingly Mr. Justice Fortescue delivered his Opinion to be, that Somner had got a good Settlement by the serving his Apprenticeship; upon which the Justices of the Sessions made their Order accordingly. However Mr. Fazakerly said, he should submit it, that this Service should not be sufficient. He said, the Act of 3 & 4 Will. & Mary is the Statute, which allows Services by an Apprenticeship to be equivalent to Notice in Writing. But that Statute requires the Apprenticeship to be by Indenture; which must be understood to be an effectual Indenture; now the Statute of 8 Anne 9, 39. declares, that such Indenture shall be void, and intirely ineffectual, where the Duty is not paid, or the Indenture stamped. Accordingly the Court made a Rule to shew Cause.

Vide post.

The King and Dr. Ward.

Vide ante
251, 294.

THIS Matter now coming on to be argued upon the Return to the Mandamus, Mr. Strange opened it to be, that the Office of Register was granted to Dr. Sharp and another for Life, and to the Survivor of them, that the other Grantee died, and thereupon Dr. Sharp appointed one Shaw his Deputy; that Articles were exhibited against Shaw in the Court of the Archbishop of York, in Order to deprive him; and that thereupon it was proceeded so far, as that Shaw was suspended for five Years. The Return then set forth a Canon, which impowers the Archbishop to appoint a Deputy in the Room of the Person so suspended for, one, two, three or four Months, or longer; and that accordingly the Archbishop had appointed one in the mean Time. The Return then set forth, that the Day before the Suspension, Shaw resigned his Deputation; and thereupon Dr. Sharp appointed Dryden his Deputy, who is the Person on whose Behalf the Mandamus was granted. It was farther alledged, that an Appeal was brought upon this Sentence of Suspension before the Delegates, which remains yet undetermined, and that an Inhibition was directed to the Commissary from the Archbishop, to admit no one pending the Appeal; and that for these Reasons the Commissary could not admit the Party now complaining. Mr. Strange said, that two Points might be proper to be inquired into; one, whether a Mandamus would lie in this Case at all; the other, admitting that it would, whether the Return to the present Mandamus be sufficient. To the first of these Points he said, he should admit, that a Mandamus would not lie on the Application of the Deputy himself; the Authority of the Case in Lev. 307. is so; and the Reason for that Case is, because the Authority of the Deputy is revocable at the Will of the Person making him his Deputy; but yet he said, it was as certain, that a Mandamus would lie on the Application of the Party making him his Deputy; because his Freehold is concerned in Interest; and so is the express Authority not only of the Case last mentioned, but likewise of Ven. 110. To the second Point he observed, that the Nature of a Mandamus was not to establish a Right, but

barely to put a Man into Possession; and therefore there are many Things which would be material, if the Matter of Right had come in Question, which cannot be material in the present Case. Accordingly he said, it has been held, that a Non fuit electus is no Return to a Mandamus. So in the Case of The King and Symphon, Mic. 11 Geo. 1. where a Writ was directed to Swear in Church-wardens, it was held to be no Return, that an Inhibition came from the Bishop of London to prevent his doing it. To consider then the Substance of what appears upon the present Return, he said, it was manifest, that the Party ought to be admitted. The Canon indeed does allow the Bishop to supply an Office upon a Suspension of a Deputy; but this can be understood no longer, than the Officer omits doing it himself. But the Officer has actually appointed another Deputy in the present Case; and therefore that Deputy ought to be admitted. Mr. Filmer on the other Side urged, that the Mandamus would not lie. He said, it certainly would not for a Proctor; so is 3 Mod. 332. and in 6 Mod. 18. it is expressly said by Lord Chief Justice Holt, that tho' these Writs had been granted in some Cases, he thought they had been granted minus rite. However he said, he should submit it, that the present Mandamus at least ought to be superseded; because it is not alledged in the Mandamus, that the Commissary is the proper Officer to admit a Deputy-Register. And in all the Entries he could find, this Form is constantly observed. Mr. Strange by Way of Reply submitted it; that the Party had waived this Exception, by not suggesting this in his Return. And besides, he said, in the Writ itself there were the Words, Tu tamen non habens rationabilem causam, to refuse Admittance, have refused to do it; which he thought would supply it. The Chief Justice said, as to the Case of The King and Symphon, he did remember that Exception; but he thought the Point was ruled upon another Matter, that the Person appeared to claim an Office at Colchester; and that the Bishop of London had granted this Inhibition; but it did not appear, that Colchester was within his Diocese. The Court upon the two first Points inclined to grant a peremptory Mandamus; but they thought the Third, about the Form of the Writ, deserved to be considered of. So ordered Precedents to be searched. Vide post

Anonymus.

ON Rule to shew Cause, why an Information should not be granted against one Mr. Baldwyn, who was Deputy to the High-Bailiff of Westminster, for entering into the House of a Gentleman in a most outrageous Manner, mistaking it for Col. Charters's, who had been convicted for Felony. Mr. Wynn said, that he had Affidavits to produce, which directly denied, that Mr. Baldwyn was any Thing concerned in it. But the Court said, for that Reason this Matter ought to be tried. Accordingly made the Rule absolute. But the last Day of the Term, on Rule to shew Cause for an Information for an Assault, the

How far the Court will grant an Information against a Sheriff's Officer.

Chief Justice and Judge Lee said, they do not make Rules of this Sort absolute when the Fact is denied; and upon that discharged that Rule.

Anonymus.

How far any
Plea in Bar
shall be said
to be an is-
suable one.

MR. Theede moved to set aside a Plea for its not being agreeable to one of the Judge's Directions. The Judge had given Leave at his Chamber, that a Judgment should be set aside, upon the Defendant's paying Costs, pleading an issuable Plea, and accepting Short Notice of Trial. But the Plea, which the Defendant had put in was, that the Plaintiff's Testator was convicted at the Old Bailey for Felony. Upon which M^r. Theede objected, that there was no Manner of Colour of Truth in this Plea, and besides the Intent of the Judge's Rule was, that the Defendant should plead the General Issue; for which Reasons, he hoped, his Motion should be allowed. But the Court said, that any Plea in Bar was within the Meaning of the Rule; accordingly refused the Motion.

Verden and Lord Berclat.

How far the
Court will
not give a
Man time to
put in his
Answer till
he has en-
tered his Ap-
pearance.

MOTION was made for Time to put in the Defendant's Answer, though the Defendant had not appeared, upon account of their being no Attachment taken out against him for his not appearing, so not in contempt. The Court agreed, that the ancient Practice used to be so; but of late for about these six Year the Officer informed them, the Practice constantly was, to refuse these Motions, till the Party should enter his Appearance, in such Cases, where the Party did not appear in Time, equally as upon an Attachment. And upon that the Court refused the Motion in the present Case.

Wilcox and Huggins.

Vide ante
349.

Serjeant Hawkins now argued for the Defendant, and Serjeant Chappel for the Plaintiff; Serjeant Chappel said, that he should submit it, that the Construction upon this Statute has been settled to be, that where a Creditor enters his Action within six Years after the Debt contracted, he thereby obtains another six Years for his Executor, as well as himself. And to this purpose he quoted the Case of Lethbridge and others Administrators of Richards against Chapman and his Wife, Mich. 3 Geo. 2. in the Common Pleas. The Statute of Limitations was there pleaded; and the Plaintiff's replied, that Richards, who was an Attorney of that Court, prosecuted a Writ of Privilege, Mich. 8 Geo. 1. which was continued down till Hill. 11 Geo. 1. and the 9th of November following Richards died. The Administrators did not commence their Suit, till Mich. 13 Geo. 1. It appeared upon the Face of the

the Face of the Declaration too, that Administration was committed to the Plaintiffs above a Year before the Commencement of their Suit. And yet held by the whole Court, that this Case was out of the Statute of Limitations; and accordingly Judgment given for the Plaintiff. And the Court at that Time gave this Reason for the Judgment; that where-ever an Intestate has begun his Action within Time, the Administrator shall always have six Years. He said, if this was so, he submitted it, there was equal Reason, that when an Executor commences his Action in due Time, his Executor likewise shall have another six Years. And so when there is no default in the first Person, every Executor shall have six Years in his own Time. But Serjeant Hawkins on the other Side argued, that every Debt, that an Executor sues for, is to be sued for, as a Debt of the Testator, and not as a Debt of his own; and therefore there was good Reason, that the Testator should be answerable for that Part of the Delay in suing for his Debt, which incurred in his own Time; and that Delay should run on and be continued in the Time of the Executor. The general Authority of the Books, he said, was express to this Purpose; and accordingly cited *Lutw. 256, 261*. He said too, it was well known that the Action commenced by the Testator must be continued down to the Time of the Declaring; in order to shew, that it was commenced to save the Benefit of the Statute. He observed then, that there was equal Reason, that the Executor should make his Action to be a Continuance of the Testator's, as near as possible; which must be done by commencing it in reasonable Time; and that may be before Probate; though he cannot indeed proceed in it till after; because he must produce the Probate into Court to intitle him to declare on it. The Court declared, that, unless it was for the Authority of the Case determined in the Common Pleas, they should have been pretty clear of Opinion, that the Time incurred in the Life of the Testator must go on in the Time of the Executor. They seemed to agree too, that the Action commenced by the Executor must be brought in reasonable Time, in order to make it as near as can be a Continuance of the Testator's. But what that reasonable Time was, they owned themselves to be in Doubt. The Chief Justice said in *Lutw. 256*. some of the Judges thought, that would be a reasonable Time in this Case, which is held to be so in the Case of purchasing a Writ by Journeys Accounts. But Judge Lee said, he should think a Year to be a reasonable Time in the present Case; because the same Statute has appointed that to be the Time in another much like the present Case; where it has appointed, that within that Time a Man shall commence a fresh Action; when it happens, that the Judgment in the first is reversed upon a Writ of Error. However they ordered this Matter to stand over. Vide post.

Lewis and Lewis.

Vide ante
330.]

MR. Fazakerly now argued for the Plaintiff in Error; and said, he should submit it for a general Rule, that no Action would lie for what is done in a Course of judicial Proceeding; unless there be special Damage attending it. And the Reason for that, he said, was, because the Court will take upon themselves to correct those Misdemeanours. But in the present Case, he submitted it, that there could be no Colour for this Action. For if the Verdict in the Original Action was right, the Party was not injured; and if the Verdict was wrong he has a good Remedy by Attaint. Besides he said, it does not appear upon this Declaration, that the Judgment was given in the former; and then it was certain, this Action was brought too soon. To support this general Learning he said, many Cases might be cited. Particularly he mentioned that in 2 Cro. 601. and Harton 11. in which last Book it is held, that an Action will not lie for giving false Evidence. So neither will it lie for putting in false Bail according to the Case cited by Doderidge in the same Place in Cro. before-mentioned. He said likewise, it was known and certain, that no Action would lie for a malicious Prosecution, till the Judgment given in the Original Action. But besides, he said, there was a Fault in the Declaration, which made the Action clearly bad. The Declaration sets forth the Proceeding in the former Cause, and the Verdict being given for the Plaintiff, and then goes on and says, that the Plaintiff there Praemissorum non ignarus imbraced the Jury, ratione quarum quidem sollicitationum the Jury gave a Verdict for the Plaintiff. Now he observed, that the Praemissorum included the Verdict as well as the other Part of the Proceedings; and if a Verdict was given before the Imbracery, the Imbracery could be no Offence whatsoever. Mr. Filmer on the other Side argued, and said, that on the last Argument the Court were of Opinion with Mr. Fazakerly on the same Point, which he now argued; but the Matter which stuck with the Court at that Time was, whether the Ratione, &c. was a sufficient Averment of special Damage. And therefore he should confine himself to that. He said, if an Action is brought by a young Woman for Words, per quod Maritagium amisit; the per quod is a sufficient Averment, and that, though the per quod is the Itt of the Action, so that the Action will not lie without it. He said too, this was the same of a Virtute cujus, or a Praetextu quorum; and in general, he said, he did not know, that there was any particular Words, which the Law required as necessary to describe an Averment by. He said, he did not know, there was any Decasion for him to say any Thing farther; but if it was doubted whether this Action would lie, though there was not special Damage, he said, many Cases might be cited. To this Purpose he quoted 5 Ed. 4. 126. cited in 4 Rep. 18. where it is held, that if a Man forges a Note, an Action will lie even before a Conviction of the Forgery. So likewise it is held, that if an Attorney enters Judgment for the Plaintiff where the Court orders a Non pros, an Action will

will lie. The Court said, that they were in no doubt, but the Action would lie, if the Special Damage was sufficiently averred. And at present they thought the Averment was sufficient; especially after Verdict. However ordered this Matter farther to stand over.

Tash and Dupree.

ON a Writ of Error upon a Judgment by Default in the Common Pleas, Mr. Reeves took an Exception, that it did not appear by the Return to the Writ of Inquiry, that the Inquest was taken before the Sheriff, it is only said, that the Inquest was taken per duodecim, &c. which can only relate to the Jurors, and not to the Persons before whom the Jurors gave their Verdict. The Court said, that in these Entries made upon Record there are only short Recitals made of such Part of the Proceedings; that therefore they thought the, &c. might include this; and if this did not appear upon the Return, they should have brought the Return up by Certiorari; as is done in the Case of Originals. Accordingly the Court affirmed the Judgment.

What shall be said to be a good Return to a Writ of Inquiry.

The King and The Corporation of Newcastle upon Tyne.

MR. Reeves moved to discharge a Rule for an Attachment against the late Mayor and some others, for not returning a Writ of Mandamus, upon account of its being only mentioned in the Affidavit, that certain Persons, of the same Name with the late Mayor, and these others, were served with the Rule to return the Mandamus; but not said, that they were the Persons against whom the Mandamus was granted first of all. And the Court seemed to be of this Opinion; otherwise they said, the Party making the Affidavit could not be indicted for Perjury. And they said, they thought this Objection might now be made, though they did not shew Cause upon the Rule. However at last this Objection was waived, and the Return put in.

The Certainty required in an Affidavit which is made use of in order to have an Attachment for neglecting to make the Return to a Mandamus.

The King and Norris.

A Rule having been granted to shew Cause why a Mandamus should not be directed to the Mayor of Newcastle to swear in certain Persons Freeman of that Corporation, Mr. Fenwick now moved to discharge it, upon account of their Freedoms not being regularly given them. He said, the Charter required, that the Presence of the Mayor should be necessary at all corporate Assemblies; but in the present Case the Mayor dissolved the Assembly, as soon as the List was given in of these Persons Names, before they were admitted to their Freedoms; and therefore he submitted it, that their Admission was irregular. But the Court said, it is very true, that no new Business can

What Things may be done by a Corporation in the Absence of the Mayor.

See 2. L. Raym. 1236.

be proposed in the Absence of such Officer; but the Assembly has always a Right to proceed in the Business, that was begun, when he was present. Accordingly they made the Rule absolute.

Rastwell and Griffith.

How far a
Person can-
not sign
Judgment
for not pay-
ing for the
Copy of the
Issue.

UPON the Master's Report of the Irregularity of a Judgment, the Case appeared to be, that the Plaintiff had signed his Judgment for not paying for the Copy of the Issue, but yet he had demanded 2 s. more for the Copy of the Issue, than was really due upon it. The Court said, that the Plaintiff's Demand in these Cases ought to be strictly according to the just Fees, and the Demand ought to be formally entered upon the Copy of the Issue. And therefore, though the Defendant had tendered no Money at all, the Court set the Judgment aside.

Richardson and Chancey.

The Remedy upon an Award.

THE Proceedings upon an Attachment for the Breach of an Award having been referred to the Master for Irregularity, he reported the Case to be, that the Plaintiff had obtained Judgment in Debt upon the Arbitration Bond, and that some Evidence was laid before him, that the Plaintiff had actually taken the Defendant in Execution, at the same Time, that he is now proceeding upon the Attachment. Mr. Coningsbey however submitted it, that this Proceeding was regular, and instanced the Case of a Man's bringing an Action of Covenant upon a Mortgage, and bringing an Ejectment at the same Time. And said too, that the Point in Question is determined in Salk. 73. The Court said, that they certainly would not suffer the Party to take both of these Executions at the same Time; tho' perhaps taking Judgment in the Action of Debt might be consistent with the present Proceedings. And upon that referred this Matter to be farther inquired into by the Master.

Doo and Hunt.

How far Proceedings in an Ejectment will not be regular without the Consent of the Tenant.

THE Irregularity of a Judgment in Ejectment having been referred to the Master, he reported the Fact to be, that the Landlord had given Authority to an Attorney to appear for the Tenants, which he did accordingly, but without the Tenant's Privity; upon which the Court set the Judgment aside; and ordered the Attorney to pay Costs; and said farther, that even the Landlord himself could not make himself a Party to the Suit, till the Tenants had appeared, but upon a Supposition, that the Tenants will appear; for he is only to defend the Possession with them.

Phillips and Knightley.

THIS Matter coming on again to be argued upon another Record, wherein there was the same Order of Pleading, and a Demurrer to the Replication; Mr. Fazakerly relied upon that single Objection to the Award, that the Arbitrators had not put an End to the Action between Marshall and the Plaintiff; but had only given the Plaintiff an Action of Covenant against Marshall, in Case he should proceed in it. Mr. Draper however submitted it on the other hand, that the Award was good enough. In Roll's Abridg. 548. and 1 Cro. 541. he said, it is held, that if two Persons are Co-obligors and Defendants in an Action, and enter into Bonds of Submission, and the Arbitrators award, that the one Obligor shall acquit the other of the Bond due to the Stranger; this Award is good; tho' the Obligee may immediately put the Bond in Suit against both Obligors; and consequently the other Obligor may immediately be molested. He cited 1 Mod. 9. to the same Purpose. He said besides, that in 1 Roll. 249. it is held, that Arbitrators may award, that one Man shall enter into a Bond to pay Money to another, and not directly to pay it. And in 2 Cro. 400. 'tis held, that where an Award was made, that all Matters in Difference should be determined, except what related to such a Bond; but that that should stand in force; such Award was good; and yet there all Differences were not determined. So he said, it was a known Rule, that Arbitrators may appoint Costs to be taxed by an Officer of the Court. And for these Reasons he submitted it, that the Award was good. But Mr. Fazakerly, by Way of Reply, answered, that as to the Cases first cited, the Arbitrators had awarded all that was in their Power; but in the present Case they have not. And as to the Case in Rolle 249. he observed, that it is beyond Dispute, Arbitrators may appoint Money to be paid at a future Day; and consequently may require Security to be given for it in the mean Time. So the Case in 2 Cro. he said, that the Arbitrators did make their Award concerning the Bond, as well as concerning the other Differences; and awarded, that that should stand as a good Security; which is making a Determination of that Matter as well as the others. And to the last Case he took Notice, that Arbitrators cannot be supposed to be the proper Judges of Costs of Suit; and it is for that Reason, Arbitrators are allowed the Assistance of one of the Officers of the Court. The whole Court declared their Opinions to be, that the Award could not be maintained. The Reason which the Chief Justice gave, was; that if Marshall should proceed in his Action, such Proceeding would not be so much a Breach of the Award, as of the Covenant. But the Reason, which the Three other Judges gave, was, that the Covenant requires Marshall to indemnify the Plaintiff against all Costs and Damages, which shall attend the other Action. But those Damages cannot be ascertained, but by a Jury in a second Action; and therefore there is plainly no End put to all the Differences. However the Court order'd this Matter to stand over.

Vide ante
84.

Vide post

Dr.

Dr. Bently qui tam *and* The Bishop of Ely.Vide ante
192.

THIS Matter now coming on to be argued upon Demurrer to the Prohibition, Mr. Harper, as Counsel for the Bishop, said, that he hoped upon the whole Record a Consultation should be awarded. He observed, that there were two previous Questions, which it would be proper to have the Opinion of the Court upon, before they entered into the general Inquiry about the subject Matter of the Articles exhibited against the Doctor; one, whether the D^r. can be answerable singly for such of the Facts, as the Articles charge him to have committed jointly in Concurrence with the Body of the College; the other, whether the D^r. can plead the general A^a of Grace made the 7th of the late King in Bar to the present Inquiry. For both these Matters the D^r. has relied upon in his Replication, and to that Replication the Bishop has demurred. To the first of these Matters he observed, that wherever a College. subject themselves to the Censures of the Visitor for an A^a, which the College have jointly concurred in; such Censures can only be insisted upon them in their private Capacity. For a Visitor's Power never reaches to a Suspension or Deprivation of the Franchises of the Corporation; since that would be to give the Visitor a Power of Destroying the Corporation itself. He said, if this was so, the Conduct of each particular Member might be inquired into, how far he assisted in this collegiate A^a. If he did assist, he deserved to be punished; if he did not assist, he deserved to be discharged. To this Purpose the Case was put of a Corporation's setting their common Seal to a Bond, with Condition, that such a Person committed Murder; where undoubtedly each individual Member, who gave his Assent to the A^a, would be indictable for the Offence. To the second Point he observed, that the A^a of Grace was only a General Pardon of all such Crimes, not particularly excepted, as the King might pardon by express Words. And therefore such Crimes could only be intended to be forgiven, which might be punished by Indictment, and were Crimes against the State. But Statute of Colleges are only the Rules for the Government of a private Family; and therefore Offences against those Statutes cannot be supposed to be taken into the Consideration of the Legislature in passing the present Law. Accordingly the Court delivered their Opinions as to both Points, that they could be no Bar to the Bishop's Citation. However they said, they had a Doubt amongst themselves, whether there did not appear to be such a Fault in the Proceedings, as would make it to be to no Purpose to go on any farther. They said, the Bishop's Citation has been upon the Statute of 40 Eliz. but in the Plea the Bishop has averred, that King Edw. 6. has made the Bishops of Ely, for the Time being, Visitors of the College; and therefore it is to be doubted, whether the Stat. of Eliz. are not void. For which Reason a Day was given to speak to this Question. And then Mr. Harper came again, and argued, that the Statute of Eliz. might be well maintained. He said, it was a Point not clearly

clearly known, whether the Statute of Edw. 6. had appointed the Bishops of Ely for the Time being, Visitors of this College for ever; the Words of the Statute being only, Episcopus Eliensis Visitor sit. He said, it was not a certain Thing, that those Words would bind the King's Successors; and it might be a Question, whether the Construction of them would not more properly be, that the then Bishop of Ely should be Visitor, or the Bishops of Ely for the Time being during the Life of that King only. He said however, that he must allow, that the other Construction of the Words might more properly be maintained; because about the same Time, that these Statutes were made, in 15 Hen. 7. 1. b. it was held, that a Prior's Successor might take Advantage of a Licence to purchase in Mortmain made by the Crown to the Prior himself; tho' the Licence was not made to the Prior and his Successors. But tho' he should admit this Point to be so, he said, he should submit it, that the Statutes of Eliz. are good notwithstanding; and what he would rely upon in Proof of this should be, that in all Royal Foundations the Kings of England for the Time being, have a Privilege of giving new Statutes with the Consent of the College, and that tho' a general Visitor is appointed; especially, where such Visitor consents to the Statute, and acts under the Authority of them. He said, this was like the Case of all Corporations. The King indeed cannot give a new Charter, unless the Body accepts it; but if the Body does accept it; the Charter is well given. The Authority of the Books he owned was very rare in the particular Instance of the Statutes of Colleges. But what he would offer as an Evidence of this Privilege was, that almost all the Kings of England from the Time of Edw. 6. have in Fact given new Statutes to this College, besides Queen Elizabeth; which might be proved by producing them to the Court under the Great Seal. And this has not only been the Case of this College; but, he believed, of all the Royal Foundations in both Universities. And this, he said, he hoped would be admitted as a Proof of a Right; especially when not one Resolution has been offered of the Practice being illegal. Dr. Hinchman besides said, it was settled in the Case of University College in Oxford, that, where the King, who founds a College, dies, without giving any Statutes any of the King's Successors for the Time being, may give at different Times what different Statutes they think proper. And it may be doubted, whether the Heirs of a private Founder can do this. The Court inclined to their former Opinion, that Qu. Eliz. Statutes were void, notwithstanding what had been said; however ordered this Matter to stand farther over.

Vide post

The Bishop of London and Lewen against The Mercer's Company.

IN a Writ of Error upon a Judgment in a Quare Impedit, that I had been brought in the Common Pleas, for a Disturbance in a Presentation to the Church of St. Mary Colchurch within the City of London, Serjeant Chappel opened the Case to be; that

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Construction upon the Statute of 22 Car. 2. c. 11. sec. 63. relating to the Union of Churches in the London,

the Plaintiffs had set forth in their Declaration, how that the Church of St. Mary Mildred in the Poultry, and the Church of St. Mary Colchurch, were two ancient Churches within the City of London; and burned down by the great Fire. They then set forth the Act of 22 Car. 2. c. 11. sect. 63. for rebuilding the City, by which it is provided, that these two Churches shall be united together, amongst several other, which there is the same Provision made for. And then the 68th Clause of the Act is set forth, which says, that of those Churches that are united by this Act, the Patron of such Church shall first present after the Fire, which was of the greatest Endowment before it. The Plaintiffs then set forth, that the Church of St. Mary Mildred was of the greatest Value at the Time of the Fire, and that the King was Patron of the said Church at the Time aforesaid; by which he, the Plaintiff, presented soon after the Fire, that were Patrons of the Church of St. Mary Colchurch, by which it now belongs to them to present. The Bishop claimed nothing in the Church, but as Ordinary. The Defendant Lewen pleaded, that long before the Mercer's Company any Thing had, the Hospital of St. Thomas of Acorn was seised of the Church of Colchurch, as Impropriators in Fee, that this Hospital was dissolved in the Time of Hen. 8. and so the Church came to the Crown, and from the Crown was granted to the Mercer's Company before the Fire. Absque hoc, that the Mercer's Company were Patrons of the said Church at the Time of the Fire. Upon this Fact Issue was joined; and the Jury found a Verdict for the Plaintiffs. But Serjeant Chappel said, he should submit it, that the Fact, upon which the Issue was tried, was a Fact by no Means material; for whether the Church was an Impropriation at the Time of the Fire, or whether it was a Presentation, it was exactly the same Case. The Intent of the Act could never be, that by the uniting the two Churches, the Benefit of filling up one should be lost. And to this Purpose he begged Leave to apply a Case out of 3 Lev. 435. the Judgment indeed of the Court of King's Bench and Common Pleas, he did allow, was against him; but those Judgments were reversed in the House of Lords. He said then, that if this was to be admitted, that the Issue was joined upon a Point not material; the Consequence was clear and manifest, that the Person, for whom the Issue was found, cannot have Judgment. To which Purpose he relied upon the Case of Broome and Woodward, two Terms ago in the Common Pleas. In Trespass some of the Defendants justified there under a Distress for Rent; and in their Plea set forth an Appraisement in the Presence of the Headborough of the Liberty of the Rolls, loco Constabulari; but yet upon the Fate of their Plea it appeared there was a Constable. The Plaintiff there replied *De injuria sua propria, absque tali causa*. And Verdict was for the Defendant, but that Verdict was not allowed by Reason of its being Insufficient. Serjeant Chappel did allow, that in the present Case this Objection was made at the Trial before the Chief Justice of the Common Pleas, and he over-ruled it; he did allow likewise, that this Objection was over-ruled by the Court, when a new Trial was moved for upon the Foundation of it; but yet, he hoped, that this Court would consider it, as an Objection

of Weight, and reverse the Judgment upon it. The Court said, that the Intent of the Parliament seemed clear to design only to ascertain, how the Turn should commence. However thought this a Matter proper to stand over.

Vide post

Dr. Gouch and The Bishop of London.

DR. Hinchman came to shew Cause, why a Prohibition should not go to the Archb, to stay the Bishop of London from Proceeding in a Suit began there, for a Pension due from Dr. Gouch, as Archdeacon of Essex. He said the Libel had set forth, that the Archdeacons of Essex for the Time being had for many Years used exterior Jurisdiction in granting Probate of Wills, and Letters of Administration, and that in Consideration of this there became due a yearly Pension from the Archdeacons of Essex to the Bishops of London; which Pension, as the Libel sets forth, the Archdeacons of Essex tenentur solvere. So that, he said, the Libel only charged, that there was such a Right, without setting out any particular Manner, in which the Right became due. He then observed, that there were Schedules annexed to the Libel of Extracts out of Registers, and other antient Writings, wherein Notice was taken, that such a Pension was ex antiquo debet & de jure consuet. But neither in these, he said, was there any Mention made, how the Pension became due; only that in Fact it was due, and that it was an antient Payment. He took Notice, that the setting out these Proofs was according to the constant Proceeding of these Courts; and indeed no other Proof can be allowed, but what is set out in this Way; and this is called the Subsidium Probationis. However he observed, that Dr. Gouch had thought proper to plead, that no such Pension was due Time out of Mind; and upon this has obtained a Rule to shew Cause for a Prohibition. But Dr. Hinchman said, he hoped, it should be discharged. He said, the Authority of the Books was clear, that the Ecclesiastical Courts may hold Plea of a Pension, even by Prescription, if such Prescription is not controverted; and so is 2 Inst. 491. and Salk. 58. But in the present Case he observed, that the Bishop had not set out any Title to his Pension, much less had he set out any prescriptive One; and therefore the Dr.'s Plea was bad in controverting such Prescription. He said, it might be objected possibly, that it was necessary, that a Title should be set forth; but if that should be admitted to be necessary, the Want of such Matter could only be taken Advantage of upon an Appeal, and not upon a Prohibition; for the Force of such Objection only is, that the Proceedings are in verso ordine. But Mr. Reeves on the other Side argued, that tho' the Drs. Rule was right, that the Ecclesiastical Courts may hold Plea of a Pension, where the Title is by Prescription; yet it was a Rule equally known, that where such Prescription is denied, a Prohibition shall go pro defectu Triationis. The Forms of the present Proceedings, he said, were drawn in a very artful Manner, in order, that this settled Distinction of Law might be evaded. He said, it was not pretended by the Bishop, that any

How far a Prohibition shall not go in a Suit for a Pension.

Com.

Composition could be found, by which this Right was to be supported. The only Title then could be a Prescription. The Bishop, he said, was unwilling, that such a Title should be tried by a Jury; and therefore has taken this Method to set forth no Title at all in his Libel. He was forced however to discover his Title in the Schedules annexed to the Libel; and that appears to be founded merely upon Usage. The Doctor, he said, has himself admitted, that the Words of the Extra's are, that the Pension was *ex antiquo debiti & de jure consueti*; but he observed, that there was an Award set out likewise, by which this Matter would more evidently appear; for there it is expressly said, that the Pension was due Time out of Mind. To the Matter so appearing upon the Libel, and the Schedules annexed to it, the Defendant has pleaded, that there was no such Usage. The Ecclesiastical Court, he said, has received this Plea; and by that have admitted it to be a proper one. Accordingly he hoped the Prohibition should stand. The Court said, if this Right was once founded upon a Composition, it would be hard, that they should stop the Ecclesiastical Court from Proceeding, because the Composition is lost. The Words in the Extra's out of the Registers, and even in the Award, they said, were only general Expressions, that the Payment had been anciently made; and therefore it did not appear to them, that the Suit was founded upon such a Title, as the Common Law calls a Prescription. If the Libel was too general for want of a Title to the Pension being ascertained, they said, the proper Remedy was by Way of Appeal. And accordingly discharged the Rule for the Prohibition.

Porter and Jones.

The Time
for suing out
a Testatum.

ON Rule to shew Cause, why a Testatum *capias ad Satisfaciendum* should not be quashed, Mr. Strange said, that two Exceptions had been taken to it; one, that there was no *Capias* directed to the Sheriffs of Middlesex, before the suing out of the Testatum; the other, that the Money had been levied upon an *Elegit*, before the suing out of this Writ. But in answer to the first of these Objections, he observed, that it was settled about three Years ago, in the Case of Stone and Stone, that the *Capias* in Middlesex, and the Testatum *capias* might be taken out both together. And to the second Objection, he said, that there was no Return to the *Elegit* upon the File, and therefore there could be no Notice taken of what was done upon that; and it was not the suing out of the *Elegit*, but the Execution of it, which would be a Bar to the *Capias ad Satisfaciendum*. But Mr. Reeves on the other Side said, that possibly the Act of suing out of the *Elegit* would be no Bar to the *Capias* (tho' Serjeant Chappel, who was of the same Side, cited the Opinion of Lord Coke, 2 Cro. 339. that even that would) but yet he said, that this Court would certainly never suffer a Man to take a double Satisfaction, because by Accident the first Writ might be lost, or some other Thing might hinder, that the Return to the first Writ could not be filed. But the Court said, that the Defendant ought to have

moved, that the Return to the *Elegit* might be filed. However thought it proper, that this Matter should go before the Master to see what was done upon the *Elegit*.

Anonymus.

ONE Mary Freeman was brought up by Habeas Corpus, from the Work-house, where she was committed to Hard Labour, as taken upon a privy Search, for being an idle and disorderly Person, without Bail and Mainprize, there to remain, till the next Quarter-Sessions. Upon this she moved either to be bailed or discharged. And because the Court conceived it to be a Matter of Difficulty, they appointed a Day, in which it should be particularly spoke to. And now Mr. Strange argued, that the Commitment could not be maintained. The only Statute, he said, which there seemed to be any Colour to found this Commitment upon, was the Stat. 7 Jac. 1. c. 4. and the material Clause in that Stat. was the 5th Sect. But, he said, the whole of this Sect. he submitted it, was repealed by 29th Sect. of the Stat. of 12 Anne Stat. 2. c. 23. and therefore this Commitment could not be maintained in the very Substance of it. But however that might be, he said, there were great Exceptions, that might be taken to the Form. In the first Place, he said, it no where appears in the Commitment, that the Persons signing it were Justices of the Peace. He observed if this was to be taken to be a bare Commitment, he should submit it, that this Objection would be fatal. In the Case of The Queen and Clark, the Defendant was committed for taking up Money upon Bills on the Usaualling Office, that were counterfeited; and the Defendant was discharged in that Case; because it did not appear, that Sir Thomas Withers, who committed him, was a Justice of Peace. He said, in the Case of The King and Rainsford, Mich. 3 Geo. 1. this Case of The Queen and Clark was cited, and the Defendant discharged upon the same Exception. But however he insisted, that this Commitment was to be taken to be a Conviction, and then this Exception would unquestionably be good. And to shew, that this must be a Conviction, he thought, there was Occasion to use no farther Argument, than to consider the Severity of the Punishment, namely, that she is ordered to be kept to hard Labour, without Bail or Mainprize, to the next Quarter-Sessions. He then observed, that the Form of this Commitment was bad upon another Account, for the Facts being not set out in the Commitment, which proved her to be an idle and disorderly Person. And to shew, that Commitments were bad, for this Reason he applied the Case in Vaughan 135. He said likewise, that it no where appears upon the Commitment, that there was any Warrant to found the privy Search upon. And if this was to be taken to be a Conviction, that would be a most clear Exception. And besides he observed the Time, which the Justices have ordered her to lie under this Commitment, is by no Means warranted by this Statute. And therefore for these Reasons he hoped, she should be discharged. Mr. Reeves and Serjeant Darnel argued

What shall be said to be a good Commitment.

on the other Side, and said, that they should submit it, that the Commitment was good both in Form and Substance. They said, they were by no Means for allowing, that this Commitment can only be maintained upon 7 Jac. they thought it well might upon the 6th Sect. of the Stat. of 12 Anne beforementioned. This Section indeed speaks only of Rogues and Vagabonds; but a Woman, who is idle and disorderly, might well come under the Description of a Rogue. And so is Dalton 23. 209. But if this should be given up, they observed the Commitment might strictly be maintained upon the Stat. of 7 Jac. They said, it must be allowed, that this Part of the 5th Sect. of the Statute of Jac. relating to the petty Search only was repealed in the Manner, that has been mentioned. But that was only one Method the Justices have of taking Notice of these Sort of People; the Justices may send for them by their particular Warrant, or they may have them before them in other Ways; and then they may put in Execution this Clause of the Statute. To the first Objection then that had been taken to the Form of the Commitment, they observed, that this was to be taken to be a bare Commitment. They did allow, that if the Statute had required the Person so committed to undergo the Punishment of being whipped, such Commitment would be a Conviction. But where the Punishment is only hard Labour, it is otherwise. And to this Purpose they applied an express Case out of Sid. 281. But besides they observed, that if this was a Conviction, it ought to have been brought up by Certiorari; and there is no other Method of taking Advantage of Errors in Matters of that Nature. And then, if this was to be considered but a bare Commitment, there was no Colour for the Exception that has been taken. In all Warrants, that are signed by the Judges or the Secretaries of State, there is no Notice taken of their Offices. But besides, if this was a Fault in itself, it was helped by the Return, for the Return sets forth that they were Justices, and there were ten of them in Number. And to shew, that the Return would cure this, the Case in 1 Show. 182. was cited, and likewise the Case of The King and Gibson, Pasch. 1715, in which last Case the Defendant was committed for not passing his Accounts; an Exception there was taken, that it did not appear upon the Commitment, that one of the Justices was of the Quorum. That Exception would clearly have been bad, tho' even in a Commitment, if the Fault could not have been cured; but there it was held, that it was cured by the Return. To the second Exception in Point of Form, they said, the Words of the Commitment were according to the Direction given by Lord Coke, in his Comment upon this Statute, 2 Inst. 730. The third Exception they said would be answered by considering, that this was no Conviction. And as to the last in respect of the Time, which he is to lay under the Commitment, they said, a much greater Objection would have been taken, if no Time had been mentioned; for then it would have been a Commitment for Life, and clearly bad. But they said, the present Time might be justified for two Reasons; one, that it is in itself a very moderate Portion of Time; the other, that the 6th Sect. of the Statute of Anne before

beforementioned, has prescribed this Time in another Instance; which might be a good Direction to the Justices in this. The Court declared their Opinions to be, that this Commitment could not be maintained upon the Statute of Anne; for that Statute describes only one particular Sort of idle Persons; but the Commitment is of the present Person, as being an idle Person in general. However they thought it might be well maintained upon the Statute of Jac. They said, the Statute has in the Beginning of it provided, that Work-houses shall be erected by the Justices, where idle and disorderly Persons shall be sent; and if no more had been said, they should have thought it reasonable, that the Justices should have a Power to commit to them. But besides the Words, which gives them a Power to commit such idle and disorderly Persons as are brought before them upon a privy Search, there are these general Words, That the Justices shall commit those that are brought to them at other Times. And they thought, the Intent of the 29th Sect. in the Statute of Anne only was, that there should be no more such privy Searches, as the Statute of Jac. appointed; but the Act directs, that there shall be another privy Search. As to the first Objection in Point of Form, they said, they thought this a bare Commitment with Punishment; and in such Case it could not be necessary, that the Commitment should be signed. To the Case of The Queen and Clark, they observed, there was a manifest Fault in that Commitment, for its not being said, that the Defendant knew, that the Bill was forged; and therefore that Case could not be of much Authority. And as to the Case of The King and Rainsford, they said, that was a Conviction for Keeping an Alehouse; and therefore that could not be material neither. For in those Cases, they said, it undoubtedly must appear upon the Face of the Commitment to be signed. But however they inclined to be of Opinion, that if this was a Fault in itself the Return could not cure it. To the three last Exceptions they thought, the Counsel against the Prisoner had given a clear Answer to them. The three puisny Judges likewise observed each of them something in particular. Judge Page said, that the Commitments to these inferior Prisons, used in general to be thought to be illegal, and particularly those to New-Prison; but because the Walls of the County Gaols were found to be too small for the Prisoners, those Prisons were considered by the Judges, as part of the County Gaols; and upon that it is, that the Commission of General Gaol-Delivery extends to them. But yet he thought, no one could commit to these Work-houses, but the Justices of the Peace. He then observed some Thing in relation to these idle and disorderly Persons, that he thought at Common Law they might be bound over to their Good Behaviour. Judge Probyn observed, that this Warrant would have been good upon this Statute; even tho' the Words, relating to hard Labour, had been left out, and upon such general Commitment of the Defendant, as being an idle and disorderly Person, the Gaolers would have been justified in inflicting the Punishment. And Judge Lee said, that he was of Opinion, that any Constable, as well as Justice of Peace, might have committed an idle
and

and disorderly Person before this Statute, if he did not find Surety for his Good Behaviour; and so is the express Authority of 13 Hen. 7. 10. And he observed, that the Direction in the Act, that such Persons should be kept to hard Labour, is not properly for Punishment, but for the mutual Benefit of the Publick, and the Persons committed, that they should live by their own Industry. Accordingly the Court ordered the Prisoner to be remanded. And the next Day the Chief Justice said, that he had since considered of this Case, and in looking over his Notes, had found a Commitment worded exactly as the present one was, in one Part of it, and in that Part held good. The Name of the Case was The King and Symonds, Mich. 13 Will. 3. The Defendant was committed there by one Parry to New-Prison, as an idle and disorderly Person; because he was found in a suspected Bawdy House. The Court held there, that if the Commitment had been in general, it would have been good. However upon an Affidavit of the Fact, he was committed to the King's Bench Prison. He said likewise, that there was another Case very material to be mentioned, relating to another Point in the former Argument; and that was the Case of The Queen and Elderton, Hill. 2 Anne, there the Warrant did not appear to be signed by one, who was a Justice; held, that that was not material to appear upon the Face of the Warrant; but yet, that the Officer must return this upon the Habeas Corpus.

The King and Huggins.

Vide 338.

THE Chief Justice now delivered the Resolution of all the Judges of England upon this Special Verdict, that had been argued before them. He said, they were all of Opinion clearly, that the Fact, charged in the Indictment, and found by the Verdict against Barnes, was Murder in him. They were likewise of Opinion, that the Fact, charged in the Indictment against Huggins, was Murder in him; but upon the Fact found in the Verdict, they agreed unanimously, that he should be discharged. The Objections that had been made by the Counsel for the King, he said, chiefly were, that the Defendant had the Care of the Prisoners entrusted to his Charge by the Patent, that was given him of his Office of Warden by the late Queen; and it was his Duty to have looked over them. The Counsel observed likewise, that tho' he had made a Deputation of his Office, yet the Jury have found, that he was once present within the Space of fifteen Days before the Death of the deceased; and then the Rule of Law holds, that in *Præsentia majoris cessat potestas minoris*. They took Notice, that the Verdict had found an actual Privy to the Durels in the Prisoner at the Bar, by finding, that he saw the deceased *sub duritie Imprisonamenti prædicti*. That such Privy, barely was sufficient in a Person, whose Duty it was to have relieved him, they said, was manifest from those Cases which had been put, of a Nurse laying a Child in an Orchard under some Beans, and a Kite's flying by and killing it, where the Nurse is undoubtedly guilty of Murder.

Murder. And the Counsel cited a much stronger Case than this, out of Staundeford 17. and Crompton 24. where the Case is put of a Man's keeping a Beast, knowing it to be apt to do Mischief, and the Beast getting out, without the Knowledge of the Owner, and killing another; in that Case this is held to be Murder in the Owner. The Chief Justice said, that he thought these Objections might receive a plain Answer. He observed in the first Place, that the Prisoner had appointed Gibbons his Deputy, by an express Clause in his Patent, which impowers him to make a Deputy. And when a Deputy was so appointed, he said, it was no Business in Huggins to take any Care of the Prisoners; and the whole Power over the Prisoners was in the Deputy, till re-assumed by the Principal. But he did not think, that ever a casual View of the Prisoners, would be a sufficient Act to declare the Principal's Intent to re-assume this Authority. No more, than in the Case of a Disseisor's coming to Dine with the Disseisor, that Act shall amount to a re-vesting of the Estate in him. But it must be such an Act, as discovers the Principal's Intent to execute his Office in Person. To the other Objection then that had been made, that an actual Privy to the Durels was found in Huggins, he said, all the Judges had concurred in Opinion, that they could take the Sense of that Clause in the Verdict only to be, that Huggins saw Arne, who was under those Circumstances of Durels, and not that he saw any of the Circumstances of Durels, which Arne lay under. This was the Sense, he said, which they understood this Part of the Verdict in. Tho' there was another Clause in the Verdict, which found express Privy to one Part of the Durels, which was, that he knew the Walls were damp; but even there it is not found, that he knew the Room was dangerous to live in. Neither is it found, that Arne complained to Huggins; but if that Fact had been found, the Chief Justice said it might have been another Question, and that it might have been a different Case in Huggins, from what it would have been in a mere Stranger, according to Key. 113. However all the Judges declared, that they would only judge upon the Facts found in the Special Verdict, and not what was Evidence of them. And so in the Case of The King and Plummer, Key. 111. all the Judges of England declared, that there the Facts found would have been sufficient Evidence to the Jury, to have found the Defendant guilty of Murder. But the Court would not judge upon that. And the Case of Malice, the Chief Justice said, was a Case peculiar to itself; for there the Law declares, what Facts are malicious and what are not. The Chief Justice then observed, that the Case of the Nurse, that has been cited, must be agreed to be Law. But he thought, there might be a strong Objection made to the next Case cited by the Counsel. He said, he should have allowed, that if the Beast had been a Lion, or any other Thing wild and savage by Nature, in the Case put, it would have been Murder in him that kept it. But as the Beast is supposed only to have grown mischievous by Habit, he thought it a hard Strain. Tho', he said, he should well allow, it would have been Manslaughter. The Chief Justice then observed, that the Counsel of the King

had made another Point, which it would have been necessary for the Judges to have given their Opinions upon, in Case the Verdict had been uncertain, viz. whether a Venire de novo could be awarded. He said, the Counsel did not pretend to find any one Authority in the Books for its going in a capital Case, but the Opinion of Lord Chief Justice Holt, in the Case of The King and Keet, which is reported in Keyling; yet there a Venire de novo did not go. And this Case of The King and Keet is cited by Lord Chief Justice Holt, in the Case of The King and Plummer before-mentioned; where there was the greatest Reason for a Venire de novo going, if it possibly could go in any capital Case; because if the Fact had been ascertained one Way, it would have been Manslaughter; in the other Way, it would have been Murder. Yet there no Notice is taken of this supposed former Opinion. Nor is a Venire de novo so much as proposed going. Accordingly he said, all the Judges had delivered their several Thoughts to be, that if the Verdict had been uncertain, a Venire de novo would not have lain. But they said, there was no Occasion to deliver a Resolution about it. However the Chief Justice said, in Informations and barely criminal Prosecutions by Indictment, it is very possible, a Venire de novo may lie. And so is the Authority of 6 Rep. 14. b. Accordingly upon the whole Matter the Prisoner was ordered to be discharged.

Anonymus.

How far
Commission-
ers of Bank-
ruptcy have
no Authority
to commit.

ONE Solomon Nathan had been brought up a few Days ago upon a Return to a Habeas Corpus; and because the Court thought, there was some Matter of Difficulty in the Commitment, he was ordered to be brought up again to Day. And now upon the Return the Commitment appeared to be by the Commissioners of Bankruptcy, for that the Prisoner had notoriously prevaricated upon his Examination in answering such Interrogatories, as had been exhibited to him, relating to his Estate, by which it appeared, that he had sent great Part of his Effects beyond Sea. And upon that the Commissioners had committed him to Prison, till he should make full Discovery of his Effects. Mr. Fazakerly and Mr. Strange now insisted, that this was a bad Commitment. The only Statute that gives any Colour for it, is the Statute of 1 Jac. 1. 15. 8. But that Sect. only says, that in Case the Bankrupt shall refuse to answer, or shall not fully answer such Interrogatories, as shall be administered to him by the Commissioners, they shall have a Power to commit him, till he shall better conform himself. Now the Words in the present Commitment are only, That the Bankrupt has notoriously prevaricated, which are Words of a very loose Signification. And indeed it appears, that at last he did answer; for it is said, that by his prevaricating, it was discovered, that he had sent great Part of his Effects beyond Sea. Besides it was said, that the Interrogatories ought to have appeared to have been in Writing; that it might be seen, whether they were proper; and indeed it is to be suspected, that their Examination was not proper; for it is not said, upon
such

such Examination touching his Estate; but only in the Course of his Examination in general. The Counsel took Notice farther, that the Time of the Commitment was wrong; for he is committed, till he shall make full Discovery of his Effects; whereas that perhaps may be impossible. And suppose, he was committed for not giving an Account of one Thing; yet he must lie, till he gives an Account of all. Whereas the Words of the Act ought to have been strictly adhered to in this Respect. And to this Purpose two Cases were cited out of Salk. 348, 351. The Court were of Opinion, that the Return was bad, for each of these Exceptions. They said, Prevaricating was answering backwards and forwards, though at last the Party comes to a settled Answer. But if that was the Case of the Prisoner, it was not the Intent of the Parliament, that he should be committed. Then as to the Interrogatories, the Court were of Opinion, that such of the Questions, which the Bankrupt refused to answer to or answer not fully to, should be reduced into Writing, before the Commissioners could commit him, and then they ought to demand his Answer. And so Judge Page said was Lord Holt's Opinion in the Case of The King and Tracey, the beginning of King William's Time. And the Reason that he gave was, because then it will appear, whether the Questions were proper, and if one of them were improper, he said, the Prisoner should be discharged. So in the Case of a Woman of the City of Bristol, who became a Bankrupt, Lord Holt said, that upon Request of the Party, he ought to have a Copy of the Articles. The Chief Justice said too, that he thought, the Answer to these particular Questions ought to be taken down in Writing. And Judge Lee observed, that he thought the Interrogatory, upon which the Party is committed, ought to be set out particularly; though he said, he would not give an Opinion as to that Point. They said too, that they thought, the Time of the Commitment was wrong. And the Court said, that it was intimated upon the former Motion, how the Prisoner might still be continued upon his Imprisonment, by charging him with a new Commitment. But then Serjeant Hawkins submitted it, that it appeared upon the Face of the Return, that the Bankrupt was guilty of Felony; for the concealing one's Effects in such Cases is made so by the Statute of 21 Jac. 19. And therefore he hoped the Prisoner should only be bailed, and not discharged, according to the Case of Bethel, Salk. 348. But the Court said, this appears only by Way of Recital; and therefore they discharged the Prisoner from this Commitment; and remanded him, charged with other Actions, that he was brought up upon.

Curland and Leeland.

Vide ante
319.

THIS Matter now coming on again, Mr. Paunsford submitted it, that the Apprentice gained his Settlement, notwithstanding the Statute of Ann. He said, his serving an Apprenticeship forty Days gained him a Settlement under the Statute of Car. Now the Statute of Ann. does not require that these Indentures, shall be inrolled and stamped, but within three Months after the making of them. And therefore the omitting to do this at a Time, after the Party has gained a Settlement, shall not have this Retrospect to defeat that, which was once valid and established. The Chief Justice and Judge Page declared for their own Parts, that they thought, the Words of the Act too strong to be got over; but Judge Probyn and Judge Lee seemed to think, that there is a subsequent Expression in this Clause, qualifying the general Words. However it stood over.

Vide post

The King and Kelloway.

The Manner
of Bail's
pleading Satisfaction by
the Principal.

IN a Scire facias upon a Recognisance against Bail, which they entered into, conditioned, that the Defendants in the Principal Action should pay such a Sum to the King and to the Informer; the Bail pleaded, that the Principal satisfecit the King and the Informer, without shewing how; and upon this the Attorney General demurred. Now the Counsel for the King objected, that this Plea involves two Matters, Matter of Record, and Matter in Pais; and the King can only be satisfied by Record; and therefore it was ill, for not having distinct Conclusions. They said farther, that this being in the Case of Bail could make no Difference; for in the same Way, that Bail may know, that the Recognisance was satisfied, they may know in what Manner it was satisfied. And of this Opinion was all the Court.

Blunt and Blunt.

How far an
amended
Bill shall be
considered
as a new
Bill.

MR. Wilbraham moved, that the Defendant might stand committed for putting in five insufficient Answers. But it appeared, that the Plaintiff amended his Bill, before the two last came in; and therefore the Court said, the Motion was too early. For an amended Bill is as a new Bill.

The King and Hill.

IN a Writ of Error upon a Judgment in an Indictment of Felony, two Errors amongst others were assigned; one, that it did not appear, that the Jury were returned by the Sheriff of the County; the other, that the Judgment was given against one Hall. The Attorney General said, that these were Errors in Law, and therefore he could not confess them; though it is frequent to do so upon an Outlawry. However he had an Authority from the King not to oppose the Reversal of the Judgment, if the Court should think proper to do it. Accordingly the Court said, that these were manifest Errors; and upon that reversed the Judgment.

How far the Court will reverse a Judgment in an Indictment for Felony.

Ball and Fitzgerald.

ON Rule to shew Cause why the Defendant should not be discharged out of Custody for being a Servant to an Ambassador; Mr. Reeves said, that the Words of the Affidavit, upon which the Rule was made, only were, that he was hired in Quality of a Domestick Servant to the Ambassador, and did what Services he required of him. But he objected, that it was not sworn, that he actually served the Ambassador in the Capacity he was hired in. And besides he said, the Defendant has stiled himself Apothecary in the Affidavit; and by an express Clause in the Act, which gives Protection to Ambassadors Servants, no one is intitled to such Protection, who is liable to an Act of Bankruptcy. The Attorney General on the other Side said, that by the Defendant's stiling himself Apothecary, it does not appear, that he was any Thing more, than a Journeyman, and in such Case he would not be liable to become Bankrupt. And as to the other Objection, he submitted it, that the Affidavit was certain enough. But the Court said, it was necessary, that the Defendant should have sworn, that he actually served in the Capacity he was hired. And upon that discharged the Rule.

How far an Affidavit shall be said to be sufficient or not to discharge a Person out of Custody on account of his being a Servant of an Ambassador.

The King and Shipton.

THE Attorney General said, that he came to pray Judgment against the Defendant, for Beating a Custom-house Officer; but was afraid, the Court could not be prepared to set a suitable Fine; because the late Chief Baron, who was now dead, tried the Cause, and so there could be no Report of a Judge. However proposed to the Court, that one of the Judges might be attended with the Notes, that the late Chief Baron took at the Trial. The Court said, that they thought that to be a dangerous Method; and believed the only Method could be to have Affidavits produced on both Sides. And this Method Judge Lee said, was taken in Lord Pratt's Time.

How far the Court will be convinced of Facts by Affidavit, by Reason of the Death of the Judge.

The King and Strudwick.

How far the
Court grants
a Habeas
Corpus re-
turnable im-
mediate licet
languidus.

UPON a Return to a Habeas Corpus, directed to the Warden of the Fleet, that the Prisoner was languidus, Mr. Peer Williams produced two Affidavits from Apothecaries, sworn to Day, that the Prisoner might safely be brought up; and therefore moved for another Habeas Corpus, returnable immediate licet Languidus; in order, that he might be charged in Custody with an Excommunicato capiendo. Mr. Yates on the other Side produced an Affidavit, sworn yesterday, that the Prisoner's Life would be in danger if he was brought up. The Court said, that this Affidavit was by no Means of so much Weight, as the other two; and therefore granted the Motion. Upon which he was immediately brought up. And the Excommunicato capiendo was read, directed to the Sheriffs of London. Accordingly the Court said he must be committed to Newgate; for that is the Sheriffs of London's Prison. But then an Habeas Corpus was produced out of the Common Pleas to charge him with Actions in that Court; upon which he was remanded.

Anonymus.

Whom a
Mandamus
may be di-
rected to.

A Mandamus was moved for to be directed to the late Clerk of the Blacksmith's Company in London, to deliver over to the present Officer all Publick Books of the Company to the present Officer. In the Case of the Town-Clerk of Scarborough it was said, a Mandamus of this Sort was directed to his Widow. Upon that the Court said, that in the Case of mental Officers of a Corporation, they never grant these Motions; but in the present Case they did it.

Anonymus.

How far a
Mandamus
will not lie
to compel a
Person to
grant a Li-
cence.

MOTION was made for a Mandamus to be directed to the Justices of Peace for Worcester, to grant a Licence to a Uiaualler to sell Ale. Affidavits were offered to be produced, of the Justices declaring, that they would grant no Licences to any of the Inhabitants, who signed a Petition to the Parliament for creating a Work-house there; and that the Person, on whose Behalf the Motion was now made, had been a Uiaualler in the Town for above thirty-five Years. The Court said, that they never new a Motion of this Sort granted; but if there was such a Grievance, as is mentioned, another Sort of Motion would be more proper.

Anonymus.

MOTION was made, that an eight Day Rule might be enlarged for executing a Writ of Inquiry in Town upon Account of the Defendant's living above 100 Miles off in the Country. But the Court refused the Motion; because the Defendant appeared to be an Attorney of the Court; and by that was supposed to be always attending here.

The Course of Proceeding in Actions brought against an Attorney.

Buller and Lusitano.

MR. Fazakerly moved to have Liberty to take out Execution, notwithstanding a Writ of Error, upon account of their having been another Writ of Error in the same Court, abated by Marriage. And he said, the Distinction was between the second Writ of Error being brought in the same Court, and in another. To which Purpose the Cases of 1 Mod. 285. Ven. 100. and the same Book 313. were cited. The Case of Walter and Stokoe, it was said, was the same. Accordingly the Court gave him Liberty to do it.

How far the Court gives Liberty to take out Execution pending a Writ of Error.

Williams and Ogle & al' Manucaptors of Seagrave.

ON Rule to shew Cause, why a Demurrer should not be accepted in a Scire facias against Bail; the Case was, that in setting out the Judgment in the Scire facias, wherein Seagrave was the Defendant, his Name was set out by calling him Seagrave; and upon that the Bail pleaded Nul tiel Record. To this the Plaintiff joined Issue; and farther said in his Replication, that the Person mentioned in the Judgment, and the Person against whom the Scire facias was brought, was one and the same Person; for the Addition of which Words the Defendant had demurred specially. But on shewing Cause upon the Rule, it was said, that the Defendant had accepted the Paper-Book; and therefore he was too late in demurring. However Mr. Draper urged, that the Paper-Book was delivered back and refused within four Days; and therefore that the Demurrer was regular. It was insisted on the other Side, that these four Days are only allowed in Pleas of the General Issue, and not in Pleas of Nul tiel Record. The Court said nothing as to this Point; but declared, that the Demurrer was frivolous, because those additional Words in the Replication were only Surplusage. Accordingly the Motion was refused.

Vide ante 378.

Fuller

Fuller and Josling, Executor of Lady Twisden.

Vide ante
358.

THIS Matter now coming on again, it was insisted by the Defendant's Counsel, that Letters of Attorney to enter up Judgments are bear naked Authorities, not coupled with an Interest, and to this Purpose they cited Ven. 319. in Point. And the Consequence of this, they said, was, that the present one must determine by the Death of the Party. They did allow, that the Case of Oats and Woodward was pretty strong against them. But yet they observed, that two Cases in Salk. 117. and 319. might be cited in Answer to that Authority; where it is held, that a Warrant of Attorney to confess a Judgment given by a Feme sole is countermanded by her Marrying. Besides it was said, that in the Case of Oats and Woodward the Judgment was set aside for another Irregularity; for not bringing in the Record before the Effoin-day of the subsequent Term; and therefore it was not necessary in that Case to have determined the other Point. But Mr. Reeves and Mr. Filmer on the other Side argued; and not only relied upon the Case of Oats and Woodward; but cited the Case of Sir John Parsons and Hill, Mich. 13 Will. 3. as being very material for them. The Defendant died there in the Vacation after Judgment. A Writ of Execution was taken out immediately after his Death, tested of the precedent Term, when he was living. On Motion to set aside this Execution, the Court held it to be regular; and that there was no Occasion for a Scire facias to revive the Judgment. Accordingly in the present Case the Court held the Judgment to be regular. They declared, that by the Course of the Court, all Matters entered up of any Part of a Term or of a Vacation following, shall have relation to the first Day of the Term. And therefore by the Record the Judgment in the present Case appears to be a Judgment, when Lady Twisden was living. A Warrant of Attorney to confess a Judgment is undoubtedly revocable in itself, either by the Act of the Law or by the Act of the Party; but by the Record Judgment appears to have been given, whilst the Authority was subsisting. The Chief Justice observed too, that the Case of Oats and Woodward was a full Authority to this Purpose. For, he said, he well remembered, that the Court clearly gave their Opinion upon that Point, which relates to the present Case, before the other Matter was stirred. And as to the Cases cited out of Salkeld, that a Warrant of Attorney given by a Feme sole to confess a Judgment is countermanded by her Marriage, he said, he took them not to be Law in such Cases, where by the Course of the Court Judgment can be entered up so, as to be a Judgment at the Time, when she was sole. Accordingly upon the whole Matter the Court refused to set aside the Judgment.

Term. Hill.

4 Geo. II. 1730.

Edwards and the Sword-blade Company *against* Dempsey.

MR. Reeves moved, that a Writ of Error, brought up on a Judgment in Ireland, might be amended, by striking out the Name of one of the Plaintiffs in it. The Case was, that the Action was brought in the Court below against one Sir Francis Edwards and the Sword-blade Company for a Matter, which it appeared by the Record the Defendants were Jointenants in. Sir Francis died, and yet Mary Edwards, as Heir to him, joined in the Writ of Error with the other Defendant. Upon which Mr. Reeves founded this Motion on the Statute of 3 Geo. I. c. 13. He said, he did allow, that before this Statute the Court always refused to amend Writs of Error on the Part of the Person bringing it; because the Amendment tended to the reversing a Judgment. But this Statute requires, that all Writs of Error shall be amended in any Matters, wherein the Writ of Error varies from the Record below. And in the present Case the Writ of Error does so; because Mary Edwards has joined in it, as Heir to Sir Francis; whereas it appears by the Record below, that she ought not to have done it. The Chief Justice said notwithstanding, that there are some Cases even now, wherein Writs of Error shall not be amended; and mentioned a late one in this Court, where Judgment was against Two, and the Writ of Error brought by one; held not to be amendable. However the Court made a Rule to shew Cause.

How far a Writ of Error is proper to be amended.

Vide post

The King *and* Wiseman.

MOTION was made to supersede a Writ of Mandamus, for it is being drawn up different from the Rule, which it was granted upon. The Form of the Rule was, that a Mandamus should be directed to the Defendant to require him to deliver over to one Martin, that was newly chose into the Office of Town-Clerk in his Room, all publick Books of the Black-Smith's Company; but the Form of the Mandamus was, that the Defendant should deliver over to the Company all such Books. Mr. Strange on the other Side said, that according to

Vide ante

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his Memoz the Rule was moved for in the Form which the Mandamus is drawn up in; and therefore he prayed, that the Rule might be amended. He said too, that the Office of Town-Clerk in the present Case is an Office at Will only; and therefore undoubtedly the Mandamus ought to be drawn up in the Manner that it is. The Court said, the Mandamus must be drawn up according to the Form of the Rule; and the amending the Rule will not make the Mandamus right, which was wrong at first. Accordingly superseded the Mandamus, though they did agree, that as the Town-Clerk in the present Case was not a fixed Officer, the Mandamus must be drawn up in the Form, which this was.

Anonymus.

How far a
Person shall
not be allow-
ed to com-
pound a Pro-
secution.

MR. Filmer moved, that a Judgment, signed by Default in an Information, might be set aside, for its being entred up contrary to the Agreement of the Parties. The Fact was, that an Information had been granted against the Party for signing a Certificate, that such a Person was alive, when in Fact he was dead, by which the Million-Bank were defrauded in paying Sums of Money in Pursuance of it. However upon Application to the Company they agreed, that in Case the Defendant would appear and pay all the Costs, no farther Proceedings should be had upon the Information. The Defendant accordingly did appear, and offered to pay all the Costs; and then the Company talked of new Proposals, that the Defendant should procure a Pardon; and because the Defendant insisted upon the first Agreement, they signed their Judgment. Upon this State of the Case, the Court said they were of Opinion, that the Agreement was illegal; in that a Prosecutor can by no Means justify the making up a Prosecution. But if the Agreement had been a valid Agreement, they would never have assisted in signing the Proceedings upon such an Information; but would have left the Parties to their ordinary Remedy by Way of Action, for the Breach of it.

Anonymus.

How far the
Court will
not direct,
that two
Causes of Ac-
tion shall be
join'd in one.

MR. Wright moved, that two distinct Actions of False Imprisonment, brought against a Bailiff and another for executing the same Process, might be joined together. He did allow, that he knew of no express Rule which the Court had even made of this Sort, where the Actions are brought against distinct Persons, though they frequently do it, where distinct Actions are brought against the same. But yet, he said, in the Case of Johnson and Kirby, Trin. 4 Geo. 1. a Thing of this very Nature was proposed by the Court, and consented to. A Man there had brought two Actions of False Imprisonment against a Justice of Peace and a Person executing the Justice's Process. The principal Point indeed in that Case was, that the Defendants prayed, that the Plaintiff might be dispaupered. The Court were

were of Opinion, that such Motion was too late; because Issue was joined. But yet they proposed at that Time, as a Matter more beneficial to the Defendants, that the Plaintiff should consent to join both Actions in one, and he did so. The Court said, that they believed no Rule of this Sort had ever been made; and therefore refused to make such a one in the present Case.

The King and The Bailiffs of Ipswich.

Serjeant Chappel moved, that a Writ of Mandamus might be superseceded, which required the late Bailiffs to swear Sir William Barker and another, into the Office of Bailiffs of this Corporation; for that there ought to have been several Writs of Mandamus, requiring each of them to be sworn in distinctly. He said, in the Case of the Borough of Andover this was held to be directly necessary, where Quo Warranto's were moved for upon Account of certain Persons illegally executing the Offices of Aldermen there. It was urged farther, that the Case might be, that one of these Persons were duly elected, the other not; and yet if this Writ is good, both must be sworn in upon it; to which Purpose was cited a Case in Salk. 434. in Point. And besides it was insisted, that this very Writ of Mandamus admits the Offices of Bailiffs to be distinct; because the Word Bailivi is used all through the Writ in the plural Number. The Court said, that they took it, the Office of Bailiffs of this Corporation was but one Office; and if so, it was certain there ought to be but one Writ of Mandamus. And this distinguishes the present Case from that of the Borough of Andover. However they said, it was a Rule with them, never to supersede a Writ, but for a manifest Fault in it. Accordingly refused doing it in the present Case.

How far the Court will not supersede a Writ of Mandamus.

How far the Court will not supersede a Writ of Mandamus.

Decosta and Cartwright.

IN an Action brought against the Defendant who was Postmaster, for losing certain Jewels, that were sent by the Post, the Defendant's Counsel moved, that he might be at Liberty to plead double, Not guilty, and the Statute of Limitations. The Chief Justice said, it is common to allow the Pleas of Non Assumpsit and Non Assumpsit infra sex annos; but the present Case was not exactly like that; and therefore only made a Rule to shew Cause.

How far the Court gives Liberty to plead double.

Vide post 412.

The King and The Inhabitants of King's-Fare.

MR. Reeves came to shew Cause, why an Order of Sessions, quashing an Order of two Justices, should not be quashed itself. The Case, he said, was specially stated, that one Benjamin Foster's rented a Tenement for three Years, of the yearly Value of 11 l. 10 s. in the Parish of King's-Fare, and paid all Taxes there in his own Right, but the Name of Richard Coates,

How far a Person does not gain a Settlement by paying to the Poor's Rates.

that

that rented the Tenement before, was continued in the Books of Rates. Upon this State of the Fact the two Justices were of Opinion, that Fosters gained no Settlement in this Parish; the Sessions differed in Opinion, and accordingly sent him there; and which of their two Opinions was right, was the present Question. Mr. Reeves said, he did allow, that the Words of the Statute of 3 & 4 Will. & Mar. 11. do seem to require, that a Person, renting a Tenement under 10l. per Ann. should be charged to the Taxes as well as pay them, before he shall gain a Settlement by such Payment. But he submitted it, that if such House was only rated, and not the Person living in it, yet by Payment of the Taxes, such Person would thereby gain a Settlement. And he said, it would be a Thing of the most dangerous Consequence, that Officers of Parishes should be able to hinder Persons gaining Settlements, by leaving their Names out of their Parish-Books. If this then was not absolutely necessary, he said, the present Case was attended with the strongest Circumstances, that any Case could be attended with; because it is expressly stated, that Fosters paid the public Taxes and Levies to the Parish-Officers for three Years together in his own Right. But the Chief Justice said, it is not stated, that the Officers knew, he paid them in his own Right; they might possibly have thought he paid in Right of the former Occupier; and consequently the receiving the Taxes of him, could by no Means be sufficient. And Judge Page observed, that tho' Foster's Name had been entered in the Book; yet that would not be sufficient at this Day; because a late Statute has provided, that Notice shall be publickly read in the Church of all such Persons coming into Parishes, before they shall gain Settlements by contributing to such publick Charges. Accordingly the Court ordered, that the Order of Sessions, quashing the Order of two Justices, should be quashed itself.

The Dutcheſs of Marlborough and Whitmore.

How far the Court will give Liberty that a Declaration may be amended.

Vide post

IN an Action upon a promissory Note, after Issue joined, Mr. Reeves moved, that the Declaration might be amended, by laying the Promise to be made to the present Dutcheſs, whereas in the Declaration it is laid to be made to the late Duke, and the Action brought by the Dutcheſs, as Executrix to him. He said, all was in Paper, and therefore he hoped, this Motion was not too late. The Court said, that this was a very special Amendment; because it would alter the very Nature of the Action; and therefore only made a Rule to shew Cause, tho' Notice was given of the Motion.

The King and The Inhabitants of Gonerfale.

MR. Fazakerly moved to quash several Orders of Justices of Peace. The first was in this Form. West-Riding in the County of York. To the Church-wardens and Overseers of Astwick in the said Riding, to remove, and to the Church-wardens and Overseers of Gonerfale in the North-Riding to receive. Whereas Complaint has been made unto us, two of his Majesty's Justices of the Peace, Quorum unus, for the said Riding, by the Church-wardens and Overseers of Astwick in the said Riding, &c. The Exception taken by him was, that it no where appears that the Complaint was made to the Justices of the West-Riding; and as the Complaint appears to have been made by Persons of the West-Riding, it ought to have appeared, that the Justices, to whom the Complaint was made, were likewise of that Riding. For the Ridings in Yorkshire are taken Notice of in the Law, to be equally distinct as Counties. But he observed, that according to the Rules of strict Construction, the Justices appear to have been of the North-Riding. For the first Words, said Riding, in the second Clause, are Words of Reference; and consequently must relate to the last Antecedent, which was, the North-Riding. Mr. Reeves on the other Side answered, that those Words of Reference ought to relate to the Words West-Riding in the Margin. But the Court were of Opinion, that the Construction, which Mr. Fazakerly put upon the Words, was the proper Construction; and accordingly quashed the Order. The Objection then that he took, to the other of these Orders, depended principally upon the Times in which the several Orders appeared to have been made. The Order that has been spoke of, was made on the eighth of October, 1724. which was for the Removal of the Wife and Childzen only of one Austin Stonan. On the twenty-eighth of April, 1727, an Order was made for the Removal of Austin Stonan himself singly, from Meldix to Astwick; and upon an Appeal, this Order was confirmed on the thirtieth of April, 1728. And in Pursuance of this Order, another was made by two Justices on the fourteenth of September, 1728, for the Removal of the Wife and Childzen of this Stonan, to the Place where Stonan was last sent. Notwithstanding which three last Orders, so made in Pursuance one of the other, another has been made by two Justices, ninth November, 1728. which only recites the first Order, and sends the whole Family to Gonerfale accordingly. Now Mr. Fazakerly submitted it, that this was irregular; because the last Order, confirmed by the Sessions, was the Order, which these Justices should have abided by; and tho' at the Time of making that Order, there was another Order actually in force, yet, considering how long a Space of Time there was between those two Orders, it might justly be intended, that from the Time of the first Order, the Parties had acquired a subsequent Settlement. But Mr. Reeves answered, that the first Order was confirmed at the Sessions; and therefore it ought to have been expressly adjudged in the second Order, that he had gained a

The Forms
which are
to be obser-
ved in Or-
ders of Re-
moval.

Subsequent Settlement. Accordingly the Court said, that this very Point was determined about two Years ago. And therefore the Court quashed all the Orders.

Anonymus.

How far a Prohibition lies to the Admiralty Court in a Suit against Owners of Ships.

Vide post.

Serjeant Chappel moved for a Prohibition to be directed to the Court of Admiralty, to stay their Proceedings in a Suit for arresting a Ship, till one Part-owner should find Security to the other to answer his Share in it; the one being willing that the Ship should go a Voyage, the other not. And this very Motion appears to have been allowed in Carth. 27. Pasch. 1 Will. & Mar. The Court said, it was certain, that at that Time Prohibitions were granted in these Cases, but since these Courts have been allowed to proceed; however made a Rule to shew Cause.

Williams and The Manucaptors of Seagrave.

Vide 364, 378, 403.

THIS Matter now coming on upon the Plea of Nisi tunc Record, 99. Draper argued, that however immaterial a Variance may be in a Person's Name, yet, when such Variance appears upon the Record, it may be taken Advantage of. But if that was not so between the Parties themselves, yet where a third Person is to be charged, any Variance certainly may. And even between the Parties themselves it is certain, that if a Bond had been given by the Name of Seagrave, and an Action brought upon it by the Name of Seagrave, the Plaintiff must have been nonsuited. And to this Purpose he mentioned a known Case at Nisi prius, that if a Person declares in Debt upon Bond against Peter alias dict' John; and upon Evidence the Bond appears to be given by the Name of John, the Plaintiff fails in his Declaration. But on the other Side a Case was cited out of Kelynge, where Marten and Martin were held immaterial Variances, even upon an Indictment of High-Treason. The Court said, that they took the Rule to be general, that wherever the Words have the same Sound, those Variances cannot be taken Advantage of. And therefore, where a Writ of Error varies in such Respect from the Record below, they thought it must clearly remove it up. They did allow, that in the Case of Dummol and Aldworth, the Court were of Opinion that Dummol and Dummal were material Variances; but the Chief Justice said, that he thought, those Sounds were by no Means the same. Accordingly the Court gave Judgment for the Plaintiff.

How far the Court will give the Plaintiff Liberty or not to change his Venue. Vide post.

Yarp and Plea.

MOTION was made, that the Plaintiff might have Liberty to amend his Declaration by changing the Venue after Plea pleaded; and the Court accordingly made a Rule to shew Cause.

Neeve and Debart.

AFTER Judgment upon a promissory Note, Mr. Agar moved, that it might be referred to the Master to see what was due, and that upon the Defendant's paying that, Execution might be had. But as this was after Judgment, the Court were of Opinion, they could not do it.

How far the Court cannot stay Execution on the Defendant's paying what is bona fide due.

The King and Dr. Ward.

MR. Strange now argued again to maintain the Mandamus. Vide 252, 294, 280. He said, he would first consider the Objection, that had been made to the Form of it; for if this Writ was not good in that Respect, it would be to no Purpose to consider, whether the Writ would lie at all or not. The Objection to the Form, he said, was, that it is no where mentioned in the Writ, that Dr. Ward was the proper Person to admit Mr. Dryden. He did allow, that expressly this was no where mentioned; but impliedly he said, it was strongly. For Notice is taken in the Writ, that Application was made to the Doctor to admit Mr. Dryden; but that he Minus jure refused; and this is laid to be In Contemptum Domini Regis. Now he observed, that this was impossible to be applied to the Doctor, unless he had been the Person, who was bound to admit him. Besides he took Notice, that the Writ does not absolutely require the Defendant to admit him; but if he does not, to shew the Reason for his Refusal. This Matter then would have been a proper Reason to have returned, that he was not the Person, who by Law was bound to admit him. But instead of this he has returned, that he was inhibited by the Archbishop; which is a strong Confession, that otherwise he should have thought himself bound to have done it. He observed farther, that there were many Precedents in Tremayne, where such express Words are omitted; and besides this is omitted in Ven. 110. which is a Precedent of a Case directly in Point for the Substance likewise of this Mandamus. But Mr. Filmer argued on the other Side, and said, that besides this Fault that has been mentioned, there is another Fault in the Writ, in that it is not mentioned, that Dryden offered himself to the Doctor to be sworn. And the Return, he said, could not help these Faults; to which Purpose he applied the Case of The King and Doncaster. The Court said, that it was undoubtedly certain, that both these Matters must be set out in the Mandamus expressly, or by Implication; but they thought, the first was for the Reasons that have been mentioned; and they thought the second was, because it is alledged in the Writ, that Dryden sepius se obtulit, and Dr. Ward refused him; so that it cannot be intended, but Dryden tendered himself to the Doctor. And as to the Case of The King and Doncaster, they supposed, there were some material Mistakes in the Name of the Corporation, or other Faults of the like Nature; accordingly the Court agreed, that the Form of the Writ was good. Mr. Strange then went on

on to the Substance of this Writ, and made two Points; one, whether it would lie for D^r. Sharp on the Behalf of M^r. Dryden, in Respect of M^r. Dryden's being only a Deputy at Will; the other, in Respect of its being an Ecclesiastical Office. To the first of these Points he relied upon Ven. 110. And as to the second he cited D^r. Sherlock's Case, where a Mandamus was granted to install him into a Prebend. The Court declared their Opinion, that the Case in Ven. was in Point for the first Question; and as to the second, they would not determine in general in what Cases it lay for Ecclesiastical Officers; but granted a peremptory Mandamus unless Cause.

Note; That M^r. Strange again mentioned that Non fuit electus was no Return to a Mandamus; cited the Case of The King and Symphon, Mich. 11 Geo. 1. where this Point was determined. But the Chief Justice said, that in the Case of The King and Harwood, Trin. the same Year, that Case was denied to be Law; and he took it clearly that it was not.

Decosta and Cartwright.

Vide 407.

M^r. Reeves came now to shew Cause, why the Defendant should not have Liberty to plead these two Pleas; and said, that they were directly inconsistent one with the other; for which very Reason the Common Pleas refused allowing such about a Term or two ago. The Court agreed, that the Common Pleas had refused such Motions for this Reason; but thought the Practice of this Court was to allow them. Accordingly the Rule was made absolute.

Newcam and Higgs.

How far a Prohibition will not lie to the Ecclesiastical Court in a Suit for Deprivation.

ON Rule to shew Cause why a Prohibition should not be directed to stay Proceedings in the Ecclesiastical Court, in a Suit depending there against a Clerk to deprive him for Offences of a temporal Nature, M^r. Reeves said, he should submit it, that the Ecclesiastical Courts had a Right to proceed as to Deprivation, tho' not to Punishment. For the Clerk came in by Nomination of the Parson, and not by Election of the Parish; and therefore was to be considered, as an Ecclesiastical Officer. And upon this very Distinction, he said, the Court went, in the Case of Townsend and Thorpe. Serjeant Birch on the other Side argued, that the Case cited was not in Point to the present Question. For there the Defendant was convicted upon an Indictment for the Crime he was deprived; but here the Ecclesiastical Courts must try the Crimes themselves. And he did submit it, that a Conviction upon a legal Trial by a Jury, was as necessary to a Deprivation in these Cases, as it is to a Deprivation of an Officer in a Corporation. The Offences then, that the Defendant was charged with, he said, were keeping a disorderly House, Poaching, and Drunkenness, which since the Statute they have no Consuance of. The Court said, that in the Case of Townsend and Thorpe it was

was true, that the Defendant was tried upon the Indictment; but that was only by Consent of the Parties; for, as the Case came before the Court, nothing of that appeared upon Record; tho' it did appear, that he was proceeded against in the Ecclesiastical Courts pending the Indictment. And the Court observed farther, that in the Case of Carlisle it was determined, that a Conviction upon an Indictment is not necessary, before a Man can be deprived of a temporal Office, where the Offences charged upon him are against the Duty of his Office. And that was the present Case. Accordingly the Court discharged the Rule, as to Deprivation, but let it stand, as to Punishment.

Manning and Rooke.

ON a Writ of Error upon a Judgment in the Common Pleas, the Error assigned was Want of a Warrant of Attorney. A Certiorari upon this was taken out, and the Chief Justice returned, that there was no Warrant of Attorney filed on the Term of the Placita, nor before interlocutory Judgment; but that there was before final Judgment. And now it was objected, that this was erroneous. But Mr. Parker on the other Side argued, that this was no Error; and cited the Case of Loke and Colwood. The Placita there was of Hill. Term; no Warrant of Attorney of that Term; but there was one of Mich. Term, and held to be no Error. So in the Case of the Dutch West-India Company and Henrice, Trin. 2 Geo. 2. the first Scire facias was in Hill. Term; no Warrant of Attorney of that Term; an alias Scire facias in Easter Term; and a Warrant of Attorney of that Term; held to be regular. But Mr. Robinson answered, that in the present Case the Party was out of Court, before the Warrant of Attorney filed; and therefore the Cases cited did not come up to the present one. The Court said, that the material Point to be considered of was, whether a Warrant of Attorney for Appearance is necessary to be filed at the Time of Appearance; and as the Cases cited were in Point to shew, that this was not necessary; they thought the Circumstance of the Warrant's being filed after interlocutory Judgment was not material. Accordingly affirmed the Judgment.

How far a Warrant of Attorney may be filed after an interlocutory Judgment.

The King and Lome.

THE Defendant had been indicted for refusing to exercise the Office of Constable, which he was chose into according to the Custom of the City of London. And now Mr. Abney moved in Arrest of Judgment, that no such Indictment would lie. He said in the Case of The Queen and Dacey, Hill. 10 Anne, and in an Anonymus Case, Pasch. 11 Anne, two Indictments of this Sort were quashed. And accordingly the Court made a Rule to shew Cause.

How far an Indictment will not lie against a Person for refusing to take upon himself the Office of Constable. Vide post.

The King *and* Hoare.

How far a
By Law
shall be in-
tended.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against the Defendant for exercising the Office of Warden of the Town of Hull; Mr. Packerly said, that the Constitution consisted of two Wardens, Elder Brethren, Younger Brethren, and Assistants, and was appointed so by Charter in 1638. He did allow, that this Charter provided, that the Warden should be chosen by the Body at large out of the Inhabitants. But so long as any Usages can be had of their Proceedings, the Usage has constantly been, that the Wardens for the Time being, the Elder Brethren and six Assistants, should nominate four of the Inhabitants, as Candidates for the succeeding Wardenship, a reasonable Time before the Election; and that the Election should be by the Body at large out of these Candidates so appointed. The Defendant was appointed as Candidate, and elected afterwards by the Body in the Manner that has been mentioned. And therefore the single Question would be, whether a By-Law should not be intended to support this constant Usage, according to 4 Rep. 78. He did allow, that Case was not so strong as the present one; because there the Number of the Electors was only confined; but here the Number of Persons capable of being elected. However Mr. Crowle, who was of the same Side with him, cited two Cases, that seem to come up exactly to the present one; one was, that of Barber and Poper, Trin. 6 Geo. 1. The Question there related to a Capital Burgess of the Town of Macclesfield. The Charter provided, that the Capital Burgesses should be chosen out of the Capital Burgesses. A Usage there was, and only for fifty Years, that the Common Burgesses should nominate four of the Capital Burgesses, and such Usage was held good. The other Case was that of The Queen and Horner, 11 Anne. The Question there related to a Mayor of the Town of Marlborough; there was a Usage of the same Nature; and held, that a By-Law should be supposed. Mr. Reeves on the other Side answered, that when the Motion was originally made, the Counsel for it relied singly upon the Charter. This Usage, that is supposed, they had no Opportunity of denying; and therefore the Rule for the Information ought to be made absolute; that the Fact may be tried. The Court said, if the Fact was admitted, they believed, there would be a good deal of Difficulty to maintain the Usage; but however to avoid Expence to the Parties, they thought the best Way would be to give the Counsel for the King a Day to answer the Affidavits; and if the Fact should then be admitted, to take the Opinion of the Court upon the agreed State of it. Accordingly enlarged the Rule.

Yark and Keet.

MR. Prime now came to shew Cause, and said, that the ^{Vide ante 410.} Issue had been made up, and Notice of Trial given, though afterwards countermanded. And therefore he submitted it, the Motion for changing the Venue was now too late. But Judge Page and Judge Lee, being only in Court, made the Rule absolute.

The King and The Inhabitants of Preston.

UPON an Order of Removal the Case was specially stated, ^{How far a Person gains a Settlement by his living in a Parish as a Servant.} that a Servant was hired for a Year, and before the End of his Service, two Inhabitants offered him two Guineas, if he would get rid of his Service and leave the Parish; according he received the Money, left his Service seven Days before the Year was up, and 9s. was deducted out of his Wages; and upon that the Parish Officers paid the two Guineas to the two Inhabitants. Upon this State of the Case Mr. Yates submitted it, that here was a manifest Fraud, appearing upon the Face of the Order; and therefore moved, that the Order might be quashed, which adjudged this to be no good Settlement. Accordingly Judge Page and Judge Lee, being only in Court, made a Rule to shew Cause.

The King and Whight.

THE Defendant had been confined at the Old Baily upon an ^{How far the Court grants a Certiorari to the Old Baily.} Indisment founded on 18 Eliz. 5. for compounding a Prosecution; and upon moving in Arrest of Judgment, the Chief Baron and Judge Probyn, who sat there in the Commission, declared, the Exceptions were of such a Weight as deserved to be considered in this Court upon a Certiorari; upon which Mr. Kettleby now moved for one, and the Court accordingly granted it.

Dymock and Chandler.

Serjeant Chappel now moved, that the Rule might be made ^{Vide ante 410.} absolute upon Affidavit of Service, and no Cause shewn to the contrary. However the Chief Justice said, that he was very unwilling to make it absolute; for that he remembered three Cases later then that cited out of Carthew; where the Court declared their Opinion, that the Admiralty Court had Jurisdiction in these Suits. The first was that of Plumtree, 9 W. 3. The second determined a Term or two after in the Common Pleas. And the third was that of Legrave and Hedges, 7 Anne, in this Court. There were eight Part-owners of a Ship, six

he had a Mind he should go out, two not; a Recognisance was given by the Sir by Way of Security to the Two in the Admiralty Court, a Libel there upon that Recognisance; and the whole Court declared their Opinion, that the Suit was regular, however granted the Prohibition, upon Terms, that they would declare in it; but seeing the Opinion of the Court, he believed they did not proceed in it. Then as to the Case cited out of Carthew, he said, if there was any such Resolution it appears to be a sudden one; and one Thing is very strange in the Report of it, that Lord Chief Justice Holt is made to say, that an Action upon the Case would lie for one Part-owner against the other for sitting out the Ship against the other's Consent. Serjeant Chappel then said, that they had actually tendered Security to the Party himself, and he had refused accepting it. The Court said, if Security should be tendered to the Court and they refused accepting it, that might be a Reason possibly of granting a Prohibition; accordingly for the present enlarged the Rule.

The King and Huggins.

Vide ante
350.

Scac. **M**R. Fazakerly now argued for the King, and insisted chiefly on the Case of Savage and Becham, reported in 3 Cro. 293. and in Moor 597. The Court however (Baron Commins absent) declared their Opinion, that a voluntary Escape of a Gaoler's Turnkey, could not be imputed as a voluntary Escape in the Gaoler himself; but he would be answerable on such Account only as for a negligent One; for which Reason they thought the Prisoner Boy's well in Execution again at the Suit of the Crown. And as to the Question, whether this Information could be maintained, they thought it well might on the Statute of Westminster 2. before-mentioned. However, as there were other Counsel desired to speak to the Case for the King, this Matter was adjourned farther to another Day. And afterwards in Hill Term following the Court gave Judgment for the Defendant.

The King and Heath.

The Construction of Charters concerning what Persons are qualified to be elected Members of a Corporation.

ON Rule to shew Cause, why an Information in the Nature of Quo Warranto should not go against the Defendant for taking upon him the Office of Common Council-man of the City of Exeter, the Case was, that the City of Exeter was incorporated in 3 Car. 1. and the Charter provided, that de cætero in perpetuum the Common Council should be elected de discretioribus Civibus & Inhabitantibus Civitatis prædictæ; and further ordered that in Case any Freeman of the City should refuse to execute any of the Offices within the said City he should be grievously punished. The Defendant was elected into the Office of Common Council-man, being a Freeman but not an Inhabitant; and whether this was regular, was the Question, Mr. Fazakerly said, that in general it must be allowed to him, that where

where the Inhabitants of a Town are incorporated, and no Provision made out of whom the Officers of the Corporation shall be elected, they may be elected out of the Freemen at large as well as the Inhabitants; and so was it determined in the Case of the Town of Hertford, and likewise in the Case of one Powel for the Town of Brecknock. The Difficulty then in this Case arises from the Words of the Charter, which seem to make Inhabitaney a necessary Qualification to a Common Council-man. But as to that he thought the Words might well be construed by Way of Direction to the Electors, as pointing out what would generally be most proper, rather than by Way of Restriction, as making this absolutely necessary. To which Purpose the Case was cited of the Borough of Truro, where there was a Clause, that the Aldermen should be annuatim eligendi; the first Sense, that has been mentioned, was put upon these Words and not the other. But what would effectually determine this Question, it was said was the subsequent Clause in the Charter, whereby all the Freemen, inhabiting or not inhabiting, are required to be punished in Case they do not execute the Offices within the Corporation. The Court said, that the Charter has provided expressly in many other Instances, that Elections shall be out of the Freemen at large, as well as those inhabiting within the City; and therefore they thought, the Construction of this subsequent Clause might well be construed reddendo singula singulis, that the Freemen at large should be punished for refusing to execute those Offices, which they are capable of; that the Freemen, Inhabitants, should only be punished for refusing to execute those Offices, they are so. And as to the Words Civibus & Inhabitantibus, they thought, both Qualifications must concur in the same Person, and that the Words must be construed by Way of Restriction. Accordingly the Rule was made absolute.

Anonymus.

IN a Motion of Mr. Taylor to justify Ball, a Serjeant at Law offered himself as one. But the Court said, the Court of Common Pleas had lately resolved not to admit any such Officer for Bail, and this Court had come in to the same Resolution; accordingly he was refused.

What Persons shall not be allowed to become Bail for another.

Sir Joseph Jekyll *against* Crump.

How far a
Court of E-
quiry will set
aside a Plea,
by Reason of
its not being
verified by
Affidavit.

Canc. **A** Scire facias had been taken out of the Petty Bag against **Ter-tenants**. The Defendant pleaded, that he was Lessee for Years only, and not Tenant of the Freehold. Mr. Fazakerly moved, that this Plea might be set aside, as being in Abatement, and not verified by Affidavit. Mr. Agar on the other Side urged, that such Scire facias could only be brought against Tenants of the Freehold; and therefore the Plea was to the Substance of the Writ. But Lord Chancellor set the Plea aside; and gave the Defendant three Days to plead in Bar or Demur.

The Dutcheſs of Marlborough *and* Whitmore.

Vide ante
408.

THIS Matter coming on again, the Counsel for the Plaintiff insisted, that the Nature of the Action would not be altered by the Amendment. For the Action, as it is, is brought in Right of the Testator, and so it would be, if the Amendment was allowed. And this Amendment, they said, they were under a Necessity to apply for by Reason of the Defendant's Plea; and not for any Fault in themselves. They urged farther, that in the Case of Bearcroft against the Dundred of Burnham, 3 Lev. 347. there was as great an Amendment as this; and that after Issue joined. The Court accordingly declared their Opinion to be, that the Nature of the Action would not be altered by the Amendment; and thereupon allowed it to be made. And Judge Lee said, that he took the Rule to be, that all Amendments are allowable, unless adding a second Count, whilst the Matter is in Paper.

King *and* Morrice.

Vide ante
364.

THIS Matter now coming on again, Mr. Fazakerly argued, that the Plaintiff's Evidence had supported his Declaration. That the Warrant in the present Case was such a one as the Bailiff was justifiable in executing, he said, was clear; and to this Purpose he relied upon the Case in 2 Cro. 288. If this was so, the single Question would be, whether the Plaintiff ought not to have declared upon the Warrant according as the Form of the Warrant was, or whether such a general Declaration, as in the present Case, would be sufficient. That such a general Declaration would be sufficient, and that the Evidence does not vary from it, he said, many Cases might be cited. One he particularly remembred, which Sir Clement Werg was Counsel in of one Side, and he himself of the other. The Plaintiff there declared upon a Note, as Indorſee to him or Order. Upon Evidence the Note appeared to have been indorſed to the Plaintiff only, without saying to him or Order; and yet it was held, that the Evidence maintained the Declaration.

tion. In the Case of Bishop and Morgan, Hill. 8. of the late Queen, upon Oyer the Bond appeared to have been given to Richard solvendum eidem Ricardo Bishop; and the Declaration was of a Bond to Richard Bishop; yet held to be sufficient. So Mich. 10 Geo. 1. in the Case of Lord Alscourt Say and Seal, an Indenture was produced in Evidence between Lord Say and Seal of the first Part, one Knight of the second Part, and one Johnson of the third Part; which witnessed, that for barring an Estate-tail had granted to Knight, without saying who had granted, to the Intent, that Johnson should bring a Writ of Entry against him. The Question there was, whether the Name of Lord Say and Seal should be supplied, and held it might. So Serjeant Darnel cited a Case, where a Will was produced at a Trial at Bar, witnessing, that a certain Parcel of Lands were devised to A. and his Issue, and another Parcel of Lands to B. and his Issue, and in Case they die with Issue, then to another. The Court ordered their Officer in that Case to read it, and he read it without Issue; and held good. Accordingly they said, that in the present Case the Blank in the Warrant should be supplied, or the Word versus rejected, as being insensible; and therefore they hoped, the Evidence well supported the Declaration. The Court thought this a Matter of some Difficulty; and therefore it was adjourned for farther Consideration. Vide post

Strudwick and Filher.

MR. Reeves moved, that a Writ of Error in the Exchequer-Chamber might be quashed, and that the Plaintiff might be at Liberty to take out Execution. He said, he must allow, that the Writ of Error was brought regularly; but as soon as it was brought, an Agreement was entered into, that all Proceedings upon it should be stayed; this Agreement by Consent was made a Rule of this Court; and a Release of Errors actually given; notwithstanding which the Defendant here has not discharged his Writ of Error, so that the Plaintiff cannot take out Execution. Judge Page and J. Lee, being only in Court, said, that they doubted, whether they had any Authority to quash a Writ of Error in the Exchequer-Chamber; they said farther, that they believed, they could not grant an Attachment against the Defendant for continuing his Writ of Error; but said, they took it, such Continuance might so far be considered a Contempt of the Court, as to be a sufficient Foundation to make a Rule upon to shew Cause, why he should not quash his own Writ of Error. Accordingly made such a Rule.

What Court must be applied to in order to quash a Writ of Error.

Duple-

Dupleſes and Chalk.

How far the Court does not ſet aſide a Trial for a Variance between the Record of *Niſi prius*, and the Copy of the Iſſue.

IN Debt for Rent the Plaintiff had four Counts in his Declaration; each for 38 l. and the general Demand at laſt was 152 l. but by Miſtake the Conclusion of the firſt Count was, unde actio accrevit habere 38 l. parcell. 76. which was but half the groſs Sum. However the Copy of the Iſſue was Right, viz. unde Actio accrevit habere 38 l. parcell. 152 l. For this Variance Mr. Maſh moved, that the Court would grant a new Trial, there having been no Defence made at the former. And cited the Caſe of Knute and Myonet. The Court ſaid, they were of Opinion, that the preſent Variance was in a Place immaterial; becauſe it is only a falſe Conclusion; and like the Caſe, where a viz. is contrary to the Premiiſes. And of late all the Judges have come to a Determination, not to ſet aſide Trials for immaterial Miſtakes. Accordingly the Court ſet aſide the Rule, which they had before made for ſhewing Cauſe, why the Trial ſhould not be ſet aſide.

Lepege and Pompylion.

In what Sort of Action Liberty is given, that Money ſhall be brought into Court, and ſtruck out of the Declaration.

IN Debt upon an Emiſſet for Goods bought, where the Party had declared according to the Cuſtom of the City of London, and which was removed up here by Habeas Corpus, Motion was made, that Money might be brought into Court, and be ſtruck out of the Declaration. And this was likened to the Caſe of an Indebitatus Aſſumpſit. Accordingly the Court made a Rule to ſhew Cauſe.

Denbury and Perew.

How far the Court will not diſcharge a Perſon upon common Bail.

THE Defendant had been diſcharged out of Cuſtody by a Judgment in one of the Courts of Ireland upon an Act of Parliament, that paſſed the laſt ſeſſions there for ordering poor Priſoners to be releaſed out of Cuſtody. Notwithſtanding which he was ſince arreſted here by the ſame Perſon, and for the ſame Cauſe of Action. Upon which Mr. Draper moved, that this Court would diſcharge him upon common Bail. For that he ſubmitted it, this Court would pay regard to the Judgments in all foreign Countries whatſoever. The Court ſaid, this was a proper Rule in the Admiralty Jurisdictions; becauſe that Law is in all Places the ſame. But the municipal Laws of diſtinct Countries vary; and therefore they would not ſay, whether there was any Method, that could be taken in this Kingdom to make that Judgment credited here. However this, they ſaid, was certain, that the Defendant could not be diſcharged on Motion upon it. For till the late Act of Parliament, that paſſed here,

here, they could not have done that in any of such Cases; and that *Act* does not extend to any Case happening out of England. Accordingly the Motion was refused.

The South-Sea Company and Crimes.

MR. Fazakerly moved for a Special Jury upon the late *Act* of Parliament, and that the Venire might be directed to one of the Coroners, the Sheriff and the other Coroner having Stock in the Company; and this Matter had been suggested on the Roll. He prayed farther, that the Freeholder's Book might be brought before Mr. Benton; because the Matter was concerned for the Defendant, and Mr. Ventris had Stock in the Company, and Mr. Benton was the next Officer of the Court to them Two. Accordingly the Court made a Rule to shew Cause.

Where the Venire shall be directed to the Coroner.

Edwards and Dempsey.

MR. Fazakerly now came to shew Cause, and said, that he should submit it, that in Case a Defendant's Name was prayed to be added as Plaintiff in the Writ of Error, there would be no pretence to say, that such Amendments should be allowable; and urged, that there was equal Reason, that no Plaintiff in Error's Name could be struck out, for in either of these Cases the very Nature of the Writ is altered. And this, he said, was the Reason, why in the Case of Smith and Horner, fol. 337. it was not so much as offered, that the Writ should be amended. He said besides, that this Rule to shew Cause was still more extraordinary; because it was ordered in it, that the very Assignment of Errors in the Name of Mary Edwards should be amended likewise. But the Court said, that in the present Case the Error appears upon the Record; for it is set out in the Writ, that Sir Francis was dead; and likewise the Judgment is recited, by which it appears, that Mary Edwards has no Interest. And they took it to be a general Rule in Construction upon this *Act*, that all Errors might be amended in the Writ, where they appeared upon the Record. They were of Opinion too, that no other Defects could be amended; for though in the Statute there are those general Words, or other Defect; yet they thought, they might well be confined by the subsequent Words, and made agreeable to the Record. And this, they said, gave an Answer to the Case of Smith and Horner; for there the Error did not appear upon the Record. And Judge Page said, that this Defect could not be helped by Summons and Severance of Mary Edwards; for that can only be, where two must join in a Writ of Error for Conformity, and one refuses to proceed. Then as to amending of the Assignment of Errors, it was said, all was in Paper; and therefore that might clearly be done, as a Consequence of the other.

Vide ante 405.

Grove and Drag.

How far the
Court will
not change
a Venue.

ON Rule to shew Cause, why the Venue should not be changed from London to Southampton, upon an Affidavit, that the Cause of Action, if any, arose there; Serjeant Chapel said, that the Action related to some Duties, which the Plaintiff claimed as Lessee of the Mayor of Southampton, and which all the neighbouring Towns were affected by; for which Reason they were afraid, they could not have an equal Trial there; and therefore hoped the Venue should continue where it was. The Court said, that Salisbury was the most proper Place then, that the Venue should be in, as being the next adjoining County in the same Circuit. However made a Rule to shew Cause, why the last Rule should not be discharged. And then upon Mr. Fortescue's shewing, that the Duties were exceedingly trivial, and that only the Sea-Port Towns in the County were affected by them, the Rule was discharged.

Ferrars and Lovelane.

How far a
Tenant shall
be allowed
to betray the
Possession.

MR. Marsh moved, that a Tenant, who was served with a Declaration in Ejectment might shew Cause, why he should not suffer himself to be made Defendant upon being offered sufficient Indemnity; for that there was apparent Collusion between him and the Plaintiff to deliver up the Possession. At least, he said, he hoped, the Court would make a Rule, that the Landlord might have Liberty to make himself Defendant in the Room of the Tenant. The Court said, that they never heard of any such Motion before; and therefore refused to make any Rule. But gave Leave, that this Matter might be moved again, because the Court was not full.

Harwood and Lovelane.

How far the
Court does
not stay Pro-
ceedings in
an Ejectment
by Reason of
the Death of
the Tenant.

MR. Strange moved, that Proceedings in an Ejectment might be stayed upon Account of there being no Tenant now alive, whom the Declaration was served upon. He said it was true, that the Declaration was served upon Three; but Lovelane, the only Tenant, is now dead; and the Two others were but Servants to him. He said, they had Affidavits to produce of this Matter; and this Method they took to be a proper one to lay the Matter before the Court; because it is an Irregularity in Proceeding. He said, it would be no Objection that this Motion was made before Appearance of the Defendants; for even Trials at Bar have been granted in these Actions before such Time. And there was good Reason to be given for this; because it is known, that these Motions for Judgment in Ejectment in Country Causes are not made, till the last Day in Term; and then it might be too late to apply in this Manner. But the Court said, that Motions for Judgment

ment in Ejectment are never obtained, but upon an Affidavit of Service of the Declaration on the Tenants in Possession. And if it was once allowed, that a Fact of this Nature might be controverted upon Service of a Declaration, the Court would always try the Possession upon Affidavits, before Motion for Judgment in Ejectment. For which Reason the Court said, if the Fact was so, that these two Persons, that have been served, were not Tenants in Possession, this Motion would be proper to be made, after the Plaintiff shall have got Possession on the Habere facias Possessionem; for then they certainly would set the Execution aside. However, as the Ch. Justice and Judge Lee were only in Court, a Rule was made to shew Cause. But afterwards it was discharged.

Woolaston and Walker.

IN a Writ of Error on a Judgment in the Common Pleas, where the Action was brought by an Administrator pendente lite of two Persons claiming as Executors, the Error assigned was, that such Administration cannot be by Law; and a Case was cited by Mr. Fazakerly out of Moor 636. in Point. Accordingly the Court ordered this Matter to stand over.

How far an Administration cannot be granted pendente lite of two Persons claiming as Executors. Vide post

Bateman and Fowler.

IN a Writ of Error on a Judgment in the Common Pleas in an Action of Assault and Battery, the Error assigned was, that the Fact is laid in the Declaration by Way of Recital only by a Quod cum. But Serjeant Chappel on the other Side answered, that in the Writ it is expressly set forth, and in the Common Pleas the Writ is part of the Declaration. And cited 2 Cro. 536, 537. Sid. 150, 187. Lutw. 1509. The Case of Clerk and Lucas, Mich. 2 Geo. 2. and the Case of Rogers and Gibbs last Easter Term, both determined in the Common Pleas, adjudged in Point. However the Court ordered this Matter to stand over.

How far a Fact may be laid by a Quod cum in a Declaration.

Vide post

Tucker and Mackerston.

THE Defendant was brought up yesterday upon the Return of a Writ of Appeal, and Serjeant Corbet moved, that he might be discharged, as the Plaintiff did not appear to count against him, or at least, that he might be bailed, as they had given Notice to the Plaintiff, that the Court would be moved, that he should be bailed. Accordingly the Court ordered the Plaintiff to be called; but would not even Bail the Defendant; because they would consider, whether there were not the four Days of Grace in this Action, as well as in others for the Parties to appear in. Accordingly ordered him to be brought up to Day. And now Judge Lee said, it appears by 4 Mod. 99. that the Parties have four Days to appear in. For which

How far the Court will discharge a Defendant in an Appeal.

which Reason he was remanded to be brought up again the last Day of the Term. And then, because the Appellant was not ready to count against him, he was discharged.

The King *and* Dr. Bettelworth.

How far a
Mandamus
lies to grant
Administra-
tion.

A Mandamus had been granted to require the Defendant to grant Administration to John Cullam, of the Goods of Jane his late Wife deceased. And now the Defendant returned, that before Marriage an Indenture was made, by which the Husband agreed, that the Wife should have a Power of Disposing of all her Freehold and Leasehold Estates to whatever Persons she should think proper, by any Deed or Will executed in the Presence of three Witnesses. The Return farther set forth, that Jane did make her Will, executed in the Presence of three Witnesses, and thereby gave all the Premises above-mentioned to her Mother and her Heirs, and likewise made her sole Executrix. It was likewise returned, that the Will was proved accordingly; and for that Reason, Administration could not be granted to the Husband. Mr. Fazakerly now objected to the Return, that this Instrument could not be considered as a Will, but only as an Appointment of Uses in Pursuance of a Power. And for that Reason the Probate was void; and to this Purpose cited Mod. 211. But if it should be admitted to be a Will, yet it could only be a Will of her Freehold and Leasehold Estates; and therefore Administration ought to be granted to the Husband of the Rest of her Goods remaining. But Mr. Reeves on the other Side argued, that these Instruments are properly Wills; and relied upon the Case in 2 Mod. 170. And then if this is to be considered as a Will, so as to dispose of Part of her Effects, this Mandamus is satisfied; for this Mandamus requires the Defendant to grant Administration of all her Effects. And therefore a different Mandamus ought to go. The Chief Justice was something doubtful in Opinion, whether this Instrument should be considered as an Appointment only or not; though inclined to think, that it should, principally upon Mr. Fazakerly's afterwards reminding him of a Case, which was determined before him, when he was one of the Lords Commissioners. There a Copyhold Estate was surrendered to the Use of a Will; and held, that this Instrument need not be executed according to the Forms of Wills required by the Statute of Frauds. However he was clear of Opinion, that the Defendant ought to have granted Administration of the Rest of the Goods in Pursuance to this Mandamus. Judge Page said, he thought, this Instrument could only be considered as an Appointment. And mentioned a Case, that happened at Bury Allices. There a Person had been to advise with him how to plead in a Case of this Nature. He advised him to plead, no Will. Issue upon this was taken, and came down to be tried at Bury; and the Judge held clearly, that this could be no Will. Judge Lee was of the same Opinion, and mentioned a Case in Salk. 313. full in Point. However as to the other Point, they thought there was no doubt to be made, but the Mandamus ought to

to have been obeyed. Accordingly a peremptory Mandamus was granted, unless Cause before the End of the Term.

The King and Dr. Bettsworth.

MR. Fazakerly now came to shew Cause, and said, that the Ecclesiastical Courts had an undoubted Jurisdiction in judging, who was the fittest Person to grant such Administration to. And as to the Terms, he said, they were greatly misrepresented; for they only were, that the Assets should equally be distributed to satisfy the simple-contract Debts, after the other Debts paid. Mr. Taylor on the other Side said, that he should submit it, the Ecclesiastical Courts had not that Discretion of judging of the Fitness of such Person, as has been mentioned. Indeed he did allow, that on the Statute of Car. 2. it has been held, that Administration cannot be granted to an Infant; because that Statute requires, that every Administrator shall give a Bond to make a just Distribution of the Assets. But he insisted, that then the Statute of Edw. 3. takes Place. And that Statute provides, that Administration shall be granted to the next and most lawful Friend to the Deceased. Now in the present Case after the Infant, that is Smith the Grandfather. And in Godolphin's Orphan's Legacy 231. this is held to be expressly necessary. However the Court said, that they were of Opinion, that such Administrator is only to be considered a Trustee of the Assets, without having any profitable Interest; and therefore the Ecclesiastical Courts had the proper Right of Judging of the Fitness of such Person. Then as to the Terms, they said, the only Relief could be a Prohibition, and not a Mandamus. But Judge Page said, he did think, they might be relieved upon a Prohibition. For an Executor or Administrator has a Right to prefer one Debt in Payment before another in equal Degree. And of Debts, that are in such Degree, one Debt may in Conscience be paid before another. However the Rule for granting the Mandamus was discharged.

Vide ante
370.

The King and Stowton.

MR. Fazakerly took several Exceptions to an Indictment for a Nuisance. In the first Place, he said, the Indictment appeared to be taken at the Quarter-Sessions, and it was not sufficiently set forth, that they were Justices of Peace, before whom the Indictment was taken; for the Caption is only, Ad generalem Quarterial' Session' Pacis tenet' coram Custodibus Pacis, necnon Justiciariis ipsius Regis ad diversas felon' & transgression' audiend' & terminand'. Now, he observed, that Custodes pacis is a Description of a Constable as properly as of a Justice of Peace. And as to the other Part of the Description, that only is of Justices of Oyer and Terminer; and though Justices of Peace at the Sessions have generally a Commission of Oyer and Terminer; yet as Justices of Oyer and Terminer they have no Right to hold a Quarter-Sessions. He then observed, that the Description

What shall
be said to be
a good In-
dictment for
a Nuisance.

scription of the Way, which the Nuisance is supposed to be done to, was not sufficient; for it is only said to be, communis antiqua Via pro omnibus subditis Domini Regis ad eundem & redeundem; whereas it should have been expressly set out to be Regia Via. And besides, he said, the Nuisance was uncertainly set forth; for the Words are, Quod sepe levavit seu levare causavit. He did allow, that it was afterwards laid with sufficient Certainty, that he continued the Nuisance; but that could only be on Omission to pull it down; but an Omission to pull that down, which does not appear to have been his Duty to have pulled down, could not possibly be any Offence. And by Way of Authority to support this last Exception he cited Salk. 371. and the Case of The King and Brereton for publishing a Libel, where an Exception of the same Nature was taken and allowed; and in that Case another of The King and Stocker was cited and relied upon. The Chief Justice thought the first Exception good; but was not so certain as to the others. Judge Page thought all the Exceptions good. Judge Lee inclined more particularly, that the last was good. However this Matter stood over. And afterwards in the next Term the Court arrested the Judgment for the Exception, as to the Uncertainty; but thought the Caption of the Indictment good.

Ray and —

Vide ante
375.

Serjeant Eyres now came to shew Cause, and said, that the Defendant below had not so much as pleaded, that he had not Lands in this Parish. For the Libel charged, that he had Lands lying in this Parish, rated at 5 s. and 6 d. and that he had refused paying this Rate; now he has pleaded, that he has no Lands, lying in this Parish, rated at this Rate. But this is far from alledging, that he has no Lands at all in this Parish; it is rather a direct Confession, that he has some; and only a Denial, that they are set at this particular Rate. And certainly this is a Matter, proper for the Ecclesiastical Courts to inquire into; accordingly they have done so, and by their Sentence relieved him as to 6 s. For which Reason the Court discharged the Rule.

The King and The Inhabitants of Symphon.

The Settlement
of
Children.

ON an Appeal from an Order of Removal, made by two Justices, of a Man and his Children from the Parish of Symphon to the Parish of Layton in the County of Bucks, the Sessions confirmed the Order as to the Father, and discharged it as to the Children. Mr. Fazakerly now said, that it appears upon the Face of the Order of two Justices, that the eldest of the Children is but nine Years old, some of them eight, and the other not above six; that therefore they could in no Ways be supposed to have got a Settlement for themselves; and consequently the Order of the Sessions, which separated the Father from his Children, must be bad. The Court said, it was possible, the Children might have been bound out Apprentices to Husbandry; for

for they did not know, that any Law had fixed the Age of Children for that Purpose. However made a Rule to shew Cause. Vide post

The King *and* The Inhabitants of Preston.

THE Court were now of Opinion, that no Fraud could be collected upon these Facts stated in the Order. Upon which Vide ante 415. Mr. Yates took an Exception to the Form of the Order of two Justices for that the County of Gloucester, which the Complaint was made in, was only laid in the Margin and not in the Body of the Order. The Court said, that this Exception must be allowed, and remembred, it was so determined in the Case of The King and Austin. In that Case Mr. Masterman was asked, whether the County was necessary to be laid in the Body of an Order, as well as in the Body of an Indictment; and he declared, it was. Accordingly the Court quashed the Order of two Justices, and the Order of Sessions confirming it.

The King *and* Catherel.

THE Defendant had been convicted before certain Justices of Peace, that were appointed Trustees of a Turn-pike from Kensington to Fulham, for not accounting for certain Profits, belonging to the Turn-pike, which he had received, as Collector; and now Serjeant Darnel moved, that the Conviction might be quashed. He said, it was founded on a Statute, made in the 12 Geo. 1. which appoints certain Justices of Peace Trustees of this Turn-pike, and requires an Account to be regularly taken once a Month, before them or any Seven of them that shall be present. The Act farther provides, that any two Justices then present shall have a Power of Administring an Oath to the Collector to answer such Questions relating to the Account, as shall be asked him; and in Case the Collector shall refuse taking it, he shall be committed till he does take it, and till he Accounts likewise for the Money, that shall be in his Hands. The Conviction, he said, recited, that the Defendant had refused taking this Oath, though administred by Mr. Blackerby and Mr. Marriot, two of the Justices appointed by the Trustees for that Purpose; and thereupon he was ordered to be committed till he should take the said Oath, and likewise till he should render, verum, accuratum & perfectum Computum, and pay over the Money he has in his Hands. The Serjeant now argued, that this was a bad Conviction. He said, it by no Means appeared in this Conviction, but the Defendant might have taken this Oath from the Hands of two other of the Justices then present; and that would have satisfied the Words and Meaning of the Act, as much as if he had taken it from the Hands of those two Justices, which the Body of the Trustees appointed. He observed farther, that the Sum ought to have been ascertained, which he is to account for. And if it be objected, that that cannot be known, till he has taken the Oath for answering such Questions, as shall be asked him relating to the Account; What shall be said to be a good Conviction upon the Acts relating to the Turn-pike.

Account; the Defendant then ought to have been convicted only of not taking the Oath. And indeed a Conviction of these two Facts is in itself inconsistent; for how can the Defendant be required to pay over what is in his Hands, till it is ascertained by his Oath, that there is any thing? Mr. Abney on the other Side answered, that this Conviction has followed the Words of the Statute; and therefore finding Fault with the Conviction, is finding Fault with the Statute. But indeed other Statutes are exactly in the same Words; and to this Purpose mentioned that of 22 Hen. 8. 5. And in Carth. 152. the Distinction is taken between Convictions at Common Law and Convictions upon Statute. Convictions at Common Law are till the Party shall be discharged by due Course of Law; Convictions upon Statute must follow the Words of it. However, he said, in Case the Return is bad, the Court may give leave, that it may be amended. And to this Purpose he relied upon the Cases in Cro. 533, 539. Salk. 106. and that of The King and Parmenteer and Laceer, Hill. 7 Geo. 1. That was a Conviction upon the Statute of Gaming; and it being a Commitment in Execution, the Court said, the Return should be amended. The Court said, that this Conviction had certainly followed the Words of the Statute, but they thought, not the Intent. For the Intent of the Statute must certainly have been, that the Defendant should not be committed, till he pays over the Money he has in his Hands, before it is first ascertained, that there is any. And therefore they inclined to think the Conviction was bad. But however they thought proper, that this Matter should stand over to another Day; and refused to Bail the Defendant in the mean Time; because they thought him guilty of a great Offence.

Vide post.

Baynes and Forest.

What shall
be said to be
such a Va-
riance as
may be ta-
Advantage
of on a Plea
of Nul tiel
Record.

IN a Scire facias upon a Judgment, the Defendant had pleaded Nul tiel Record; and now Mr. Thomson acknowledged, that there did seem to be a Variance between the Scire facias and the Record of the Judgment; but yet considering what it was, he moved that it might be marked, that there was such a Record. For the Judgment, he said, was given upon two Promises, but in the Scire facias it is *cujusdam* Promise & Assumption. Now he did agree, that in the Scire facias there seemed to be but one Promise; but in Order to reconcile this Variance, he submitted it, that the Word *cujusdam* might first be applied to the Word Promise, and after to the Word Assumption; or else, that the Word *cujusdam* might be rejected. The Court however were of Opinion, that this was a fatal Variance; and therefore there was held to be a Failure of the Record. Upon which he presently after moved, that the Scire facias might be amended. But the Court said, the Record has now been tried; and therefore this Motion was certainly too late. However gave leave that the Scire facias might be quashed upon Payment of Costs.

Main and Somner.

IN Debt upon Bond Mr. Pillsworth moved, that upon bring-
 ing in what was due upon the Condition with Costs, all
 Proceedings might be staid. The Court at first doubted, whe-
 ther this could be done within the Intent of 4 & 5 Ann. 16 (13)
 as the whole conditional Sum was not offered to be brought in.
 However at last they granted the Motion. And were the rather
 inclined to do so; because the staying Proceedings in this Action
 would be no Bar to another.

How far the
 Court will
 stay Proceed-
 ings in Debt
 upon Bond.

Farrars and Lovelane.

MR. Marsh now moved this Matter again. But Judge
 Page said, he remembered a Motion of the same Nature
 with the first Part of this, made by Serjeant Hall in the Case
 of one Breeman, and it was refused. Accordingly the Court a-
 greed, that it clearly must be refused in the present one. And
 were of the same Opinion as to the second Part of it. How-
 ever made a Rule now, that the Landlord might have Liberty
 to add himself a Defendant with the Tenant, in Order that, if
 the Tenant could be influenced upon to make himself Defen-
 dant, he might not be at Liberty to give up the Possession at his
 Pleasure.

Vide ante
 432.

Goodtitle and Davis.

A Motion was made for Judgment in Ejectment, upon an Affi-
 davit of Service of the Declaration on the Tenant in
 Possession; as the Plaintiff was informed and believed. He
 said, he must allow, that such an Affidavit would not have been
 certain enough in ordinary Cases; but this was an Ejectment
 of a Night-House, which no Body comes into all the Day, and
 it is difficult to know, who the Tenant is. The Court said,
 that then the Plaintiff must proceed in the old Way, by sealing
 a Lease upon the Premises. And Judge Page said, he remem-
 bered once an Affidavit made of Service of a Declaration on a
 Sexton in an Ejectment for a Chapel, and the Court there were
 of Opinion it would not do. Accordingly the Motion was re-
 fused.

The Cer-
 tainty requi-
 red in an
 Affidavit of
 Service of a
 Declaration
 in Eject-
 ment.

Anonymus.

IN an Information in the Nature of a Quo Warranto, rela-
 ting to a Common Council Man of the Borough of Marl-
 borough, Motion was made, that the Clerk of the Common
 Council might attend at the Trial with the Common Council
 Books, upon an Affidavit, that there were many Interlinea-
 tions in one of the Books. The other Side objected, that these

How far the
 Court will
 direct that a
 Person shall
 attend with
 a Corpora-
 tion Book at
 the Trial.

Motions are never allowed, but in Cases of Rasures. And in those Cases neither there is only a Rule made, that the proper Officer shall attend with the particular Book so supposed to be ras'd. Besides it was said, it did not appear, that the Town-Clerk was the proper Officer. And indeed, if the Court should be of Opinion, that the Books should be produced at the Trial, the Method would be to Subpoena the Party, and give him Notice to attend with the Books at the Trial. The Court said, there was the same Reasons for allowing these Rules in the Case of Interlineations, as in the Case of Rasures. However they said, it is certain that Book only need be attended with at the Trial, that is supposed to be ras'd. Accordingly made a Rule, that the proper Officer should attend with that Book.

The King *and* Whight.

Vide ante
415.

MR. Kettleby now said, that the principal Objection to this Indictment against the Defendant was, that he was only Attorney for the Prosecutor in the Information, and so it is set forth in the Indictment, and therefore was not within the Meaning of the Act. But the Court said, as this was a Matter of Difficulty, they certainly would not enter into it the last Day of the Term. Upon which Mr. Kettleby prayed, that the Defendant might be bailed. The Court said, that regularly speaking, where a corporal Punishment is to be inflicted, they do not Bail after Conviction. Accordingly refused it.

Johnson *against* Warren & al'.

How far a
Court of
Equity will
set aside an
Award for
Matter de-
hors.

AT the setting down of Exchequer Causes in Serjeant's-Inn. On a Bill brought for setting aside an Award, the Defendants acknowledged in their Answer, that Part of the Sum awarded to be paid, was for Matter subsequent to the Submission. Upon which Mr. Peere Williams, as Counsel for the Plaintiff said, that tho' indeed Courts of Law cannot enter into Matters dehors to set aside an Award, yet Courts of Equity may. And to shew how far Courts of Equity had carried this Matter, he cited 2 Vern. 514. There, he said, it was determined in the first Place, that when a Reference is made to three or two of them, and the two make their Award without consulting the third, that Award is void. Another Reason given for setting aside the Award in that Case was, that the Attorney in the Cause drew it up. Baron Carter said, he was Counsel in that Case, but did not remember the second Point was determined; and believed, if that Motion should once prevail, many Awards might be set aside. However the Court (the Chief Baron absent) clearly agreed, that this Award was void for the Reason above-mentioned. But because the awarding this Part of the Sum appeared to be through a meer Mistake, and the substantial Part of the Award was clearly fair and proper, the Court proposed, that the Parties should agree, that the Award should be confirmed; the whole Sum awarded paid by the Plaintiff, and

and each Side stand by his own Costs; which they did accordingly.

Whitehead and Harrison.

AT the setting down of Erchequer Causes in Serjeant's-Inn. An Ejectment having been brought of Lands, which Sequestrators had got Possession of, a Bill was brought to revive the Sequestration, and likewise an Injunction prayed to stay Proceedings in the Ejectment. Mr. Ward now moved, that the Sequestration might be revived. He did allow, that the Sequestration was taken partly upon Copyhold Lands, partly upon Freehold, and that the Defendant in the original Suit was dead. But yet he submitted it, the Sequestration was proper to be revived in the Hands of the Heir as to the whole Lands. He confessed, that this was a Sequestration on a Decree, and that such Sequestrations were but of late Date. They began in the Time of Lord Nottingham, in the Court of Chancery; and not allowed in this Court, till the fourteenth of June, 1687. in the Case of Fountain and Wavers. He confessed likewise, that they did abate by the Death of the Party; but yet, he said, as to the Freehold, it was certain it might be revived. And as to the Copyhold he submitted it, the Law was the same. For it is well known, that this Process runs upon these Lands, tho' the Common Law Process of Elegit does not. The Court said, that tho' it was true, Sequestrations run upon Copyhold; yet it was to be doubted, whether it could be revived in the Hands of the Heir to such Lands. For if it should, the Heir would not take up those Lands; and then the Lord would be without a Tenant. For which Reason they ordered the Injunction to continue only as to the Freehold Lands, and dissolved it as to the Copyhold, with Liberty to apply to the Court again.

How far a Court of Equity will direct that a Sequestration shall be revived.

Adams and Hutton.

Lent Assises. **I**N an Action of Trover, brought for a certain Quantity of Barly, it appeared upon the Plaintiff's own Evidence, that the Barly was delivered by the Plaintiff to the Defendant to be made into Malt. Upon which Judge Page declared, that Trover would not lie for the Barly, because it was delivered for another Purpose, to be made into Malt. He said too, that it would not lie for the Malt; because it did not appear that any Tender was made of the Money due for making the Barley into Malt. Accordingly the Plaintiff was nonsuited.

Of what Things an Action of Trover must be brought.

Hunt

Hunt and Gouch.

How far a
Person shall
not be bound
to prove that
Title in Evi-
dence which
he lays in
the Declara-
tion.

Lent Assises. **I**N an Action upon the Case, brought by a Commoner against the Lord, for digging Cony-boroughs upon the Common, to the Detriment of the Commoner, the Plaintiff set forth a special Title to the Common in his Declaration; but could not support that Title upon Evidence. Upon which Serjeant Urlyn objected, that the Plaintiff had failed in his Evidence; but the Court held the Evidence to be sufficient; for in this Action the Title to the Common is not in Question, but the Prejudice done to it.

Barnes and Ransom.

How far an
Indorsement
shall be good
Evidence.

Lent Assises. **I**N an Action brought upon a Note which carried Interest, and dated Feb. 1718-19, the Defendant pleaded the Statute of Limitations. And now upon Evidence the Plaintiff offered to produce an Indorsement, witnessing Interest to have been paid till 1728. Upon which the Defendant's Counsel objected, that this Indorsement was writ with the Plaintiff's own Hand; and therefore could be no Evidence of a fresh Acknowledgment of this Promise, in Order to bind the Defendant. But the Court said, in the Case of Lord Barrington and Serle last Term in the House of Lords, all the Judges of England gave their Opinion, that such Indorsement was Evidence in Case of a Bond, which the Statute of Limitations was pleaded to. Accordingly allowed this as Evidence in the present Case. Serjeant Urlyn then objected, that the Note was not properly declared upon, by setting it out to be a Note in 1718; whereas it appears to be a Note in 1718-19. But this Objection was over-ruled likewise.

Legh and Stannard.

What shall
not be good
Evidence of
the Copy of
a Judgment.

Lent Assises. **I**N an Action of Trespass for the mean Profits after a Recovery in an Ejectment, it was objected upon Evidence, that the Judgment was not sufficiently proved, inasmuch as the Witness only swore it was a true Copy, without being able to prove out of what Office the Copy was taken. Judge Page said, in Lord Chief Justice Holt's Time he remembered a Case, where an Answer in Chancery was produced in Evidence; and tho' the Witness swore, the Copy of the Answer was taken out of the Sir Clerk's Office, yet, because he could not swear who the very Sir Clerk was he had the Copy from, the Plaintiff was non-suited; and accordingly he was so in the present Case.

Spink and Hare.

Lent Assises. **I**N an Action brought by an Administrator to recover an Attorney's Bill, it was objected at Bury Assises, that Evidence ought to be given of the Bill's being tendered to the Defendant before the commencing of the Action. But Judge Page held it not material; accordingly no Evidence of that Sort was produced.

When an Action is brought upon an Attorney's Bill, what Evidence must be given in Order to support such Action.

Tinmore and Wallis.

Lent Assises. **I**N an Action brought against a Stake-holder upon a Wager supposed to be laid, that Col. Negus and Mr. Cornelius would be chosen Bailiffs of the Town of Ipswich by the eighth of Sept. last, and swore in the twentieth of that Month; the Defendant offered to give Evidence, that Col. Negus and Mr. Cornelius were not duly elected. But the Court declared, they would not suffer such Evidence in this collateral Action; no more than a Title to an Estate shall be tried in an Action of Trespass. Mr. Proctor then objected, that the Plaintiff was too soon in bringing this Action; because a Mandamus was now depending to try the Right of this Election in. But notwithstanding this, the Court directed the Jury to find for the Plaintiff. And observed farther, that in these Actions brought against Stake-holders, the most convenient Method for them is to bring the Money into Court; and then let the Parties interested go on with the Dispute at their own Expence. However, the principal Question, whether such Evidence should be allowed or not, was saved as a Point to be made a Case of.

When an Action is brought against a Stake-holder, what Evidence the Defendant shall not be allowed to give.

Coleman qui tam against The Inhabitants of Loes.

Lent Assises. **I**N an Action upon the Statute of Hue and Cry, the Husband declared of a Robbery committed on his Wife. And now upon Evidence Judge Page declared his Opinion to be, that the Husband ought to have went with his Wife before the Justice, and made Oath of his having lost this Money; and thought this Case distinguishable from that of a Servant's being robbed of his Master's Money. There indeed he did allow, the Master need not make such Oath; because the Servant or Master may either of them bring the Action at their Election; and the Servant may declare of his own Money being taken away, because of the special Property that he had in it. However he allowed the Plaintiff to proceed in his Evidence; and afterwards a Verdict was given for him, subject to the Court's Opinion as to this Point.

When an Action is brought upon the Statute of Hue and Cry, what Evidence the Plaintiff must give in Order to support it.

Salter qui tam *against* The Inhabitants of Colnes.

How far the
Judge of
Assise must
proceed to
a Cause,
notwithstan-
ding an Ob-
jection taken
to the Writ
of Nisi Prius.

Lent Assises. **I**N an Action upon the Statute of Due and Try, Serjeant Uryln objected, that the Venire was awarded on the Roll to require the Jury to come out of a particular Hundred, but the Writ of Nisi prius ordered them to come out of a different one; for which Reason he submitted it, that the Writ of Nisi prius was wrong; and consequently the Court had no Authority to proceed in trying the Cause. But the Court said, that the Roll of Nisi prius is only a Transcript of the Record above; and they would intend the Writ of Nisi prius to be agreeable to the Record above. Besides they said, this Fault might certainly be amended; and mentioned Sir John Barnard's Case, where even the Name of one of the Defendants was omitted; this Fault objected at the Trial by Judge Page himself, when he was Counsel; yet the Court ordered them there to proceed; and this Fault was amended above. Serjeant Uryln then made another Objection, that the Place mentioned in the Declaration, where the Plaintiff alledged that he gave Notice of the Robbery in, varied from the Place proved upon Evidence. And he submitted it, this was a local Action; and consequently the Variance was material. But the Court said, the Place proved upon Evidence, appeared to be within the Neighbourhood of the Place where the Robbery was committed, and the Place mentioned in the Declaration, is alledged to be no more than in the Neighbourhood; for which Reason this Variance was held to be immaterial. But then the Court said, it was incumbent upon the Plaintiff to prove, that he had described the Person robbing him; and this Construction has always been made upon the Act; otherwise the Country would not know how to pursue him. However, they would not suffer a Question so particular to be asked the Plaintiff, and because he did not swear to this Fact in giving an Answer to the general Question, whether he did any Thing more, than give Notice that he was robbed, he was immediately nonsuited.

Stavers and Parker.

How far an
Action of
Trover will
lie against an
Inn-keeper.

Lent Assises. **I**N an Action of Trover brought against an Inn-keeper by a Guest, Mr. Prime objected, that this Action would not lie, but an Action upon the Case on the Custom of the Realm, relating to Inn-keepers. However as there was a Demand of the Goods proved, and likewise a Refusal, the Court held, that this Action will lie; and accordingly the Plaintiff had a Verdict.

Term. Paschæ

4 Geo. II. 1730.

The King *and* The Inhabitants of Simpson.

MR. Pilsworth now came to shew Cause, why an Order of Sessions should not be quashed. The Case was, that two Justices had made an Order for the Removal of one Allen, together with his Daughter and two Sons, from the Parish of Monton to the Parish of ^{Vide ante 426.} The Age of the Daughter appeared upon the Face of this Order, to be nine Years; the Age of one of the Sons to be eight, and the Age of the other to be six. Upon an Appeal to the Sessions, they quashed the Order as to the Father, and confirmed it as to the Children. Upon which Mr. Fazakerly had objected on a former Motion, that the Children appeared to be of such tender Years, that they could not have got a Settlement for themselves; for which Reason their Settlement must have been, where their Father's Settlement was; and consequently the Sessions did wrong in quashing the Order of two Justices only as to the Father; whereas they ought to have quashed it as to the Children likewise. To this Objection Mr. Pilsworth answered, that it is true indeed the Order of Sessions has recited the Whole of the Order of two Justices, and has not contradicted in express Words any one Fact alledged in that Order; but yet, as the Court of Sessions has confirmed the Order as to the Children, he submitted it this Court would intend, that Evidence was laid before the Sessions, that the Children were not of such tender Age; but were of such an Age as they might have gained a Settlement to themselves, and that they actually did so. And therefore he put the Case of a Matter of Law arising from certain Facts stated in an Order of two Justices; the Sessions recite that Order, and adjudge the Party's Settlement to be different from what it would be if the Facts stated in the original Order were true. Yet there if the Order of Sessions barely recites what the Order of two Justices was, without saying how the Facts appeared to them, this Court will intend, that the Facts appeared different to the Sessions from what they did to the two Justices. Accordingly in the principal Case the Court declared themselves to be of the same Opinion; and therefore discharged the Rule.

The

The King *and* The Inhabitants of Moltsworth.

How far a
Person gains
a Settlement
by living as
a Servant.

MR. Reeves moved, that an Order of two Justices might be quashed, which was made for the Removal of a certain poor Person from the Parish of Goring to the Parish of Moltsworth. The Case, as stated in the Order, was, that this Man had gained a Settlement in the Parish of Moltsworth; but afterwards let himself for a Year, and served for that Year, to two Persons, that were Partners in a Boat, in the Parish of Goring. But it was farther stated in the Order that this Man did not live in the whole Year forty Days in the Parish of Goring; but plied with the Boat in divers other Parishes. Notwithstanding which Mr. Reeves said, he should submit it, that this Person's Settlement was in the Parish of Goring. He did agree, it has been resolved, that if a Person lets himself in a particular Parish to go a Shipboard, and he accordingly does go without serving forty Days in that Parish, such Service will not gain him a Settlement. But he submitted it, that Case did not come up to the present one; because there it appears, the Intent of the Parties was, that the Parish, where he was hired in, should have no Benefit of his Service; but here the Servant was bound only to ply with his Boat from this Parish to other Parishes thereabouts; and therefore, though in Fact he might not have resided for forty Days within that Parish; yet that was only accidental; and consequently the Servant gained a good Settlement by such Service. Besides he said, he should submit it, that the Construction of this Part of the Order, which finds, that he did not serve for forty Days in this Parish, might very well be, that he did not serve for forty Days together. And then unquestionably this would be a good Settlement. The Court however were of Opinion, that this Order must be understood to mean, that the Servant did not reside in this Parish for forty Days in the whole at any different Times within the Year. And then they said, their Opinion was, that this was not a good Settlement. Accordingly confirmed the Order.

The King *and* Hemingway.

How far the
Court of
King's Bench
will grant an
Information
against a
Steward of a
Court-Baron

ON Rule to New Cause, why an Information should not be granted against the Defendant, as Under-Steward to the Archbishop of York of his Manor of Orley in that County, for soliciting a Jury at a Court-Baron and Customary-Court holden there to present the Dying seised of such a one twenty-three Years ago of certain Copyhold Lands, and then discharging that Jury because they would not find this, and swearing another for this particular Purpose; who accordingly did find such Dying seised; though Oath was made upon the former Motion, that such finding was false; for the Party himself did not die but seventeen Years ago; Mr. Fazakerly now said, that he hoped, the Rule should be discharged. He submitted it, that

that by Law a Steward may swear a second Jury, when the first Jury refuses to find such Things, which their Oath obliges them to inquire into. But in this Case there were two particular Reasons for doing it; one, because the Foreman in the first Jury was a Party interested in the Question; the other, because the Jury, charged with this Presentment, consisted of Freeholders, as well as Copyholders; whereas the Law requires, that Copyholders only shall present the Death of Copyholders. And this is the peculiar Business of the Customary Court; whereas the Freeholders only are the Persons concerned in Matters relating to the Court-Baron. And therefore he insisted, that as there were distinct Courts kept at this Time; there ought to have been distinct Juries. The Chief Justice said, he did believe indeed, that according to the antient Law, there were always separate Juries in these Cases; but of late Years the Practice has been so universal to join them together, that the Freeholders must be intended to speak to such Things as relate to the Court-Baron, and the Copyholders to such Things, as relate to the Customary Court. Then as to the Foreman's being a Party interested, he said, there was a now of the Jury without him, and therefore that Reason could not be sufficient for changing the Jury. However in general, he said, he took it, that it would be a Thing of dangerous Consequence to allow a Steward to solicit a Jury to find any Thing against their Consciences; and upon their Refusal to do it, to swear a new Jury. Accordingly the Court made the Rule absolute for granting the Information.

Binmore and Bowler.

MR. Agar had obtained a Rule, that a Person taken on an Escape Warrant and committed to Newgate, might be re-delivered to the Marshal in Execution, upon Account of his having escaped upon a Day Rule. But now Motion was made, that that Rule might be discharged upon an Affidavit, that he was not out upon a Day Rule, when he did escape; and accordingly the Court granted the Motion.

When a Person who has escaped is retaken, what Prison he shall be committed to.

Dawes and Daley.

ON Motion to set aside an Execution for the Judgment's not being entered upon the Roll, though it was two Years since the Signing of it, the Court said, that a Rule was made in Lord Chief Justice Holt's Time, that Judgments should be entered up in convenient Time; and accordingly made a Rule to shew Cause.

Within what Time Judgments ought to be entered upon the Roll.

Lyns and Anstil.

How far the
Court will
not dis-
charge a
Person upon
common
Bail.

MR. Thede, moved, that the Defendant might be discharged upon Common Bail, upon account of its not being ascertained in the Affidavit, which the Indorsement of the Writ was made by, what was the particular Cause of Action, but only in general, that so much was due to the Plaintiff. But the Fact came out to be, that after this Indorsement was made, a second Affidavit was filed of the particular Cause of Action, before any Warrant for Arrest was made out, and therefore the Court thought this sufficiently within the Intent of the Statute of 12 Geo. 1. because this Affidavit was made before the Party could possibly be at any Prejudice. And for this Reason the Motion was disallowed.

Harman and Delaney.

Vide ante
289.

THIS Matter now coming on again, the single Question that was argued, was, whether the Words were libellous or not. The Counsel agreed on both Sides, that many Words are libellous, when put into Writing, which would not be actionable, if spoke only in loose Discourse. Particularly Cases were cited to this Purpose out of Moor 627. and Skin. 124. They agreed farther, that in Libels there is no Occasion to lay a special Damage. But the Point which they differed in was, whether the Words in the Advertisement were to be confined to the Plaintiff's Skill in making those short Guns, or whether they extended to his Skill in his Trade in general. The Court were of Opinion, that those Words viz. The said Gunsmith not daring to engage with any Artist in Town, were to be taken in the general Sense, as they were separated from the rest of the Sentence by the Word nor; accordingly gave Judgment for the Plaintiff.

Butler and Lord Montgomery.

How far the
Court will
not give a
Defendant
Liberty to
withdraw
his Plea.

IN an Action upon a Bill of Exchange M^r. Strange moved, that the Defendant might have Liberty to withdraw a Special Plea of a usurious Contract, and plead the General Issue. But because this was an Issue that was to be tried at the Bar this Term, and if the Special Plea was withdrawn and the General Issue pleaded, a new Motion must be made for a Trial at Bar after Issue joined upon this second Plea, so that this Trial must necessarily be put off to Mich. Term, the Court refused the Motion.

Horn and Mullins.

AN Action of Escape having been brought against the Marshal for discharging a poor Person out of Custody, though in Obedience to a Rule of this Court made 2 Geo. 2. Mr. Strange moved, that all Proceedings in this Action might be staid. He said, the Statute has expressly provided, that no Gaoler shall be answerable for the Escape of such Person so discharged, and that, he hoped, was a sufficient Foundation for this Motion. Accordingly the Court made a Rule to shew Cause.

How far the Court will stay proceedings in an Action of Escape.

The Bishop of London and Lewen *ver.* The Mercers-Company.

MR. Reeves now argued for the Plaintiff in Error. He said, before he would enter into the Merits of the Question, whether the Mercer's Company had any Right of supplying this Church at all, he would consider another Question, whether it is possible they can have Judgment upon this Record, be their general Right of presenting good or not. And this Objection, he said, he founded, partly upon its not being laid in the Declaration, that the Church was vacant at the Time of the first Presentation by the Company after the Fire, and partly, upon its not being laid there, that the Presentee was instituted and inducted. And if that was so, the Change of all the Turns would be altered; and whereas according to the Plaintiff's Computation their Turn now is come; it would really be the King's Turn, who was Patron of St. Mary Mildred's at the Time of the making of the Act. He did agree, that the Defendant in the Inducement to his Traveller has admitted, that this Presentee of the King was instituted and inducted; but it has been often ruled, that such Admission in a Defendant's Plea, can cure no Fault in substance in the Plaintiff's Declaration. And to this Purpose he cited 7 Rep. 24. and 8 Rep. 120. b. He then proceeded to the Merits of the Principal Question; in speaking to which he considered the Nature of an Impropriation. He said, the King, the Ordinary and the Patron must join in the making it, according to Plow. 508. b. The Impropriator is perpetual Incumbent; and if the Impropriator should present; the Impropriation would not only be thereby destroyed, but the Original Patron, who consented to the Impropriation, would be restored to his Right of Patronage; as is resolved in the same Book 501. and Hob. 308. The Advowson or Right of Patronage is considered in Law distinct from the Impropriation, and suspended so long as the Impropriation subsists; and therefore in Hob. 304. it is held, that during this Time by a Grant of the Advowson, neither the Advowson nor Impropriation will pass. The Conclusion of which Argument, he said, was, that the Plaintiffs could have no Right to this Presentation. He said, it was objected indeed upon

Vide ante 389.

How far an
Advowson
shall be Af-
fects.

upon the former Argument, that this was a Donative, and not an Impropriation; but there was no Precedence to consider this so; because it is stated in the Defendant's Plea, that the Plaintiffs and those, whom they claim under, have all along received the Profits of the Church to their own Use. An Impropriation is without doubt taken notice of by the Law to be a valuable Interest in the Impropriator; even an Advowson has been lately held to be Assets in the Hands of the Heir upon a Bill brought in the Court of Chancery; and that Decree was affirmed upon an Appeal to the House of Lords. But in the Case of a Donative the Incumbent has the whole Profits to himself. Mr. Strange on the other Side argued, and said, he did allow, that possibly the first Presentation cannot be taken to be satisfying a Turn; and therefore he must allow, that when the King presented next, he presented in the Company's Turn; but what he insisted upon was, that then he ought not to present in his own Turn likewise. He owned, that before the Statute of 7 Ann. 18. this was otherwise; but he said, that Statute has given a Quare Impedit, though a Man does not present in his Turn; and by that allows his Turn may be taken upon the next Avoidance. Then as to the Principal Point, he submitted it, that the Intent of the Statute of Car. was, that in whatever Manner these Churches had been supplied before, from thence forward the two Churches united into one, should be presented unto Turn by Turn. And to this purpose he cited the Case of Kirk and Car, Hil. 3 Geo. 1. which was determined in this Court upon a Writ of Error on a Judgment in the King's Bench in Ireland. There the Church of St. Mican had been a Donative, belonging to the Dean and Chapter of Dublin; an Act passed in that Kingdom for dividing this Church into three Parishes, reserving the Right of Presentation to the Dean and Chapter. The Question there was debated upon a Bill of Exceptions, whether these three Churches should be presentable or donative. The Court below was of Opinion they were presentable; this Court was of the same Opinion; and both Judgments were affirmed upon a Writ of Error in the House of Lords. The whole Court inclined to be of Opinion, that in the present Case the first Exception was good; and thought the Statute of Ann. made no Difference; for they took it, that Statute related only to permanent Rights, and not to such as varied by Turns. But as to the other Exception the Court differed in Opinion. The Chief Justice and Judge Page declared their present Thoughts to be, that the Company could not present. Judge Probyn seemed to think, that though the Company could not present, yet they might supply the Church after the making of the Statute in the same Manner, as they did before. Judge Lee was of Opinion, that they might present. So far, he said, seemed to him clear, that the Church was not always to be filled up by the King. If the Statute could not be construed, that the Company should present, he thought, the Original Patron would have right to do it. But rather than the Original Patron should have his Right revived to him (which if the Statute had not intervened, the Impropriators might have kept him out for ever from exercising

rising) he inclined to think, the Construction upon the Statute might be, that the Impropiators should present. However this Matter was ordered to stand over.

Vide post.

Blackford and Hudson.

IN an Action of Trover the Plaintiff had described the Parcels of Goods in the Nisi prius Roll different from what he had in the Copy of the Issue; upon which the Plaintiff had obtained a Rule to shew Cause, why the Nisi prius Roll should not be amended by the Copy of the Issue. Serjeant Eyres now shewed for Cause, that the Plaintiff must have something by him, which he made the Copy of the Issue from; and therefore there was no Occasion, that he should have this Assistance from the Defendant. However the Court (Chief Justice absent) made the Rule absolute.

By what it is that the Court directs that the Nisi prius Roll shall be amended.

Cartee and Handerson.

MR. Moreton moved in a Writ of Error out of Ireland, that the Defendant in Error might rejoin within four Days, or that the Cause might be set down in the Paper. And the Motion was granted.

When a Writ of Error is brought upon a Judgment in Ireland, how

far the Court will require the Defendant to rejoin within a short Day.

The King and Crooke.

THIS Matter now coming on to be argued again, Serjeant Darnel submitted it, that in all Indiaments, founded upon this Part of the Statute of 5 Eliz. on which the Defendant is indicted, it is necessary to be set forth in the Body of the Indiament, how and by what Possibility the Conveyance forged can effect the Freehold of another one. In Indiaments for High Treason it is a known Rule, that the Overt Act must be laid in the Indiament; the Statute of Edw. 3. requires only that there shall be an Overt Act; but yet the Construction has always been, as has been mentioned; which is an Argument that the Law is so in other Cases. And indeed it would be of dangerous Consequence, to say that an Indiament upon this Branch of the Statute would be good, if it only charged, that the Defendant forged a Conveyance of the Freehold of another, with an Intention to molest it. If this be so, the Question for the Consideration of the Court, he said, would be whether this Conveyance of a Park, called Jawick-Park, can possibly molest the Freehold of Lands called Jawick. He submitted it, that it could not no more, than if the Lands lay in different Counties. He insisted farther, that the Court cannot take Notice, but there may be such a Place as Jawick-Park; the Defendant may afterwards be punished for forging a Conveyance of that Place; and consequently, if he be punished

Vide ante 168.

nished upon this Indictment, he may be punished twice for the same Offence. He did agree, that if a Bargain and Sale had been forged without Inrollment, or a Release without a Lease, this would have been within the Intent of the Act; because in the first Case the Conveyance is good for six Months; and in the other Case a Court of Equity would supply the Defect of the Conveyance; but in the present Case, as no Agreement appears upon the Record, relating to Lands called Jawick, it is impossible a Court of Equity could decree, that Garbet should make a Conveyance of those Lands, any more than of any other Lands. He then observed, that there was another Exception taken at the Trial, and that was, that Garbet ought to appear actually to have been damnified; for the Statute says, that the Party in such Case shall have his Costs; and this Exception, he hoped, the Court would consider of likewise. The Chief Justice said, that this Cause was tried before him, and he well remembered Evidence was given of Terms of Proposal being actually made between Crook and Garbet relating to the Lands called Jawick; and that the Defendant forged this Conveyance only to borrow a Sum of Money upon it by Way of Mortgage, of one Hawkins, which he accordingly did. And if this had been stated in the Indictment, he should have thought it beyond Question, that this would have been an Offence within the Clause of the Statute, that has been mentioned. However even as the Fact was laid, the whole Court declared their Opinions, that the Indictment was sufficient; and put it upon this Principle, that it is not necessary to appear upon the Face of the Indictment, how the Fact charged did tend to the End designed; it is enough to say, it does not appear, that the Party could not have that Intention. In these Cases the Jury and not the Court are the proper Judges of a Man's Intent. Which appears from the Common Forms of an Indictment of Burglary; which only is, that A. broke the House of B. in the Night with Intent to commit Felony. However the Court said, they would not give a final Opinion till the End of the Term.

Vide post

The King and Catherel.

Vide ante
427.

THE Court now declared their Opinions, that the Conviction was bad, and for this Reason, because it orders, that the Defendant shall lay in Custody, till he pays, what shall be found due upon the Account, and it does not appear, what that Sum may be, so that this may be a Commitment for Life. They said, it was true indeed, the Words of the Conviction were, that he should be committed, till he accounted and should pay the Money, that should be due; but by being bad in Part it is bad in the Whole. Mr. Abney then prayed that they might have Liberty to amend their Conviction; and cited the Case of The King and Parmenteer where the same was done. But the Court said, the Record is actually filed in this Court; and therefore they could not do it; though they did agree, that when the Record is just come in, they do allow it. De then

then hoped, that the Defendant should only be bailed, and not discharged. But the Court said, this is a Commitment in Execution; and therefore they had no Authority to bail him. Accordingly he was discharged.

Sharter and Crimston.

MR. Lacey moved, that Proceedings might be staid on a Scire facias against Bail, a Writ of Error being brought on the Principal Judgment, and that without entering into the Rule of Arthur and Myonet, the Scire facias being not yet returnable. The Court said, they did not know, this made any Difference; and therefore refused the Motion, but upon those Terms.

How far the Court will stay Proceedings against Bail pending a Writ of Error.

The King and The Inhabitants of Utoxeter.

ON Rule to shew Cause, why some Poor Rates should not be quashed, Mr. Abney took an Exception to them, that they were standing Rates, and for that Reason were bad. To which purpose the Case of The King and The Inhabitants of Ordley, and the Case of the Parish of St. Dunstons were cited in Point. But Mr. Fazakerly on the other Side said, that these Rates were not standing Rates, to provide that each Parish should pay yearly such a particular Sum; but only, that when the Parish of Utoxeter should pay such a Sum, the other Parishes that were mentioned in the Orders should pay such a one; and so that Proportion should be observed. Besides he took Notice, that these Orders have constantly been obeyed from 1655. and in that Year the first of them was settled; and only for that present Year; and that too in pursuance of a voluntary Agreement, that had been made by these Parishes. He said besides, that he apprehended, the Court have always refused granting Certiorari's to remove this kind of Orders; to prevent Parishes being put into Disturbances by these Contentions. To this Purpose he mentioned the Case of the Town of Marlborough, Trin. 10 Ann. where indeed a Certiorari did remove up a Poor's Rate; but the Court said, if they had known, what the Order had been, before the Certiorari's going, it should not have went. And in the Case of the Parish of Hackney it was expressly refused. The Court said nothing to this Objection about the Certiorari lying; but declared, that these Rates ought not to be suffered, upon Account of the Value of the Inhabitants in Parishes frequently changing; and that this Agreement of the then Inhabitants was intirely void to bind their Successors. For which Reason the first Order though only for a Year was quashed, as being made upon a void Agreement. And the other Orders were all quashed; because they settled a fix'd Proportion for ever.

How far a Poor's Rate shall be said to be bad.

The King *and* Wellen.

The Manner
of executing
Process with-
in the Li-
berties of
Dover.

A Rule having been granted for an Attachment against the Defendant, as Register of Dover, for not bringing in the Body of a Prisoner, in Pursuance of a Rule made upon him for that Purpose, after a Return of Cepi Corpus, the Attorney General now moved, that it might be discharged. He said, the Constable of Dover has both a military and civil Jurisdiction, and he is the immediate Officer to this Court. The Constable has a Lieutenant or Deputy in his military Jurisdiction; and a Register or Deputy in his Civil. He has likewise a Court of Admiralty and Equity; and the Register has the Keeping of the Seal, which is fixed to all Sorts of Process. The Register likewise makes out Warrants for executing this Process, and likewise makes out the Returns. But he said, the Register has no Power over the Bodies of the Prisoners; the Boder or Marshal has the Custody of them. So that at most the Register can be considered, but in Part Deputy to the Constable in his civil Jurisdiction; the Boder is Deputy to him in the other Part of it. For which Reason he submitted it, this Case was by no Means like that of a Sheriff and Under-Sheriff; for there the Under-Sheriff has the Whole of the Sheriff's Authority; and such Deputation cannot be divided. The Consequence of which, he said, was, that the Rule was not rightly made upon the Register to bring in the Body; and therefore he hoped, the Rule for the Attachment should be discharged. But the Court said, the Boder did not seem to be a proper Person to make this Rule upon; because he is only in the Nature of a Gaoler. And against the Constable they would not grant this Attachment; because, though they might do it; yet as he is the principal Officer, they always do grant them in such Case against his Deputy. They did agree, that in all these Cases the Rule is made upon the principal Officer for doing the Act; and so it is in the Case of a Sheriff; but yet there is a Clause in the Rule, that Service upon the Inferior Officer shall be good Service. The Question then to be considered was, whether the Register in this Case is to be looked upon, as the inferior Officer. They said, he makes out Warrants to execute all Process, that is directed to him; he makes out the Returns to all such Process; and therefore they thought, he was sufficiently within the Description of an inferior Officer. And Judge Page said, he thought, the Acceptance of the Seal from the Constable made him a sufficient Deputy. However the Court said, if they had not so much Reason for granting the Attachment against him; yet, as he omitted to shew this Matter upon the Rule, that was made on him for shewing Cause, why he should not bring in the Body, they said, they would certainly grant the Attachment against him. Accordingly the Court refused discharging the Rule; but upon the Defendant's Consenting to go before the Master, they ordered it to lie in the Officer's Hands for a Week.

The King *and* The Inhabitants of Handsworth.

ON Rule to shew Cause, why a Certiorari should not be quashed, which was granted for removing up an Indictment for not repairing a Bridge out of the Quarter-Sessions, Serjeant Corbet said, that this Rule for shewing Cause was obtained upon the Statute of 1 Ann. 18. (5) But the present Indictment was against the Inhabitants of a Parish; by which it appeared a Trial of Right may come in Question; and therefore he submitted it, this Case was not within the Meaning of that Clause in the Statute. He said, the whole of this Statute was founded upon a former one of 22 Hen. 8. 5. but he insisted that Statute could not be construed to give the Sessions a Jurisdiction, when the Justices of the Sessions must be Parties interested. And he said, he very well remembered, Certiorari's have been granted in these Cases; though he did allow, they were not granted upon Debate. And particularly he mentioned the Case of The King and The Inhabitants of Mitcham in Surry, on his own Motion. He said besides, that the present Indictment was actually removed up; and therefore that, he hoped, would be a farther Reason for discharging the Rule. The Court said, the second Reason did not seem to them sufficient to discharge the Rule upon; but the first did. And accordingly the Rule for shewing Cause was discharged.

How far a Certiorari lies to remove an Indictment for not repairing a Bridge.

The King *and* Lady Blunt.

MR. Fazakerly and Mr. Strange moved for a Certiorari to be directed to the Old Baily, to remove up an Indictment of Perjury against the Defendant. The Indictment was exhibited by a Son against his Mother-in-Law without any Foundation, for putting a false Answer in the Court of Exchequer; the Defendant was a Lady of great Reputation and of 20000*l.* Fortune; and therefore they hoped, she should be tried in this Court. They did agree, these Motions have been often refused; and the Reason generally given is, that all the Judges are in Commission at the Old Baily; but it is well known, that the Judges sit there only in Turns; and generally do not go down after the capital Offenders are tried; so that it is probable no Judge will sit there, when this Indictment comes on. Besides they said, it usually happens, that there are two Sessions at the Old Baily in a Vacation; one, as soon as the Term is over, the other, before the Beginning of the next; but in this Vacation there will be but one. They observed farther, that it is certain, in many Cases these Certiorari's have been granted. It was done in the Case of Sir Humphry Mackworth. And Mr. Strange said, according to his Note of it, that was an Indictment against the Defendant for setting the Seal of the Mine-Adventurers Company without Authority, and not an Indictment of Forgery, as sometimes that Case has been cited to be. The Defendant there insisted, that he had a Right to set the Seal of the Com-

How far a Certiorari does not lie to the Old Baily.

pany; and for that very Reason, because a Matter of Right was to be tried, the Court granted there a Certiorari. In the Dispute between Sir Solomon Swale and M^r. Mariott, M^r. Fazakerly said, the Indictment of M^r. Mariott for Perjury was removed up from the Old Baily, singly upon Account of M^r. Mariott's Reputation. And they both said in the Case of The King and Wells, Pasch. 9. of the late King, an Indictment of Forgery was removed up for that same Reason. The Court said, they did believe Certiorari's may have been granted in these Cases for such Reasons; but they did think them Reasons very improper for Courts of Justice to act upon. And as they were certain, Certiorari's have been much oftner refused, when these Reasons have been offered, they thought fit to refuse granting it in the present Case.

Jones and Rofs.

How far the particular Instances wherein the Party wants to amend need not be specified.

MR. Wynn came to shew Cause upon a Rule, that had been obtained, for amending a Record, removed up into the Exchequer-Chamber, by a Bill as filed in this Court. And the Cause, that he shewed, was, that the particular Amendments were not recited in the Rule, nor any Notice given of them at the Time of the Service of the Rule. But the Court said, that indeed in Motions to amend Declarations this is necessary; because there is nothing in certain to amend by; but here there is a Bill filed of Record; and by that it is certain, what Amendments can be made. Accordingly the Rule was made absolute.

Norman and George.

Vide ante

UPON a Writ of Error out of the Common Pleas in an Action of Trespass and Battery, M^r. Gapper assigned for Error, that the Fact was not laid with sufficient Certainty in the Declaration; but only by Way of Recital with a Quod cum. In the Case of Rudge and Onoch, 5 Geo. 1. he said, Judgment was arrested after Verdict in a Suit by Bill in this Court upon this very Exception. In the Case of Onyon and Shore, Hill. 11 Geo. 1. that too was in Trespass and Battery; there were two Counts in the Declaration; in one the Fact was laid positive; in the other with a Cumq; etiam; and upon Intire Damages given, Judgment was arrested in this Court. And the same was done in the Case of Gritton and Franchlyn, Trin. 13 Geo. 1. And in the Case of Brigs and Sheriff, Cro. Eliz. 507. this was held bad in the Common Pleas. But M^r. Strange on the other Side argued; and said, that he did agree, that in all Suits in this Court, and likewise in Suits by Bill in the Common Pleas; this Exception would be fatal. But in the Common Pleas, where the Suit is by Original, the Writ is considered as Part of the Declaration; and therefore as the Fact is not denied to be laid with sufficient Certainty in the Writ, he submitted it, that would Cure the uncertain laying of it in the other Part of the Declaration.

Declaration. That the Writ is considered there as Part of the Declaration, seemed plain to him from various Expressions in the Declaration, as *alia enormia*, &c. *contra Pacem*, &c. *ad grave Damnum*, &c. which must have been too short, if the Declaration was considered there, as the only Thing, which the Party is to answer. Then for Authority he relied upon *Sid. 150, 187.* and *Lutw. 1509,* And he said, he was informed, this very Exception was moved in Arrest of Judgment in the Common Pleas; and the Court over-ruled it; though he did agree, one of the Judges was of a different Opinion. The Chief Justice said, he did believe, there had been two or three Cases of this Sort, where this Motion has prevailed of the Writs being considered there as Part of the Declaration; but none of these Cases, that he ever knew, came at any Time into this Court. And he said, he must own, he always thought, that the Declaration was the Charge, which the Party is obliged to answer. And he said, what he thought fully proved this to be the Case even in the Common Pleas is, that when a Variance is alleged for Error between the Writ and Declaration, the Party must pray Oyer of the Writ and bring the very Writ up by Certiorari. And the Reason for this given by Lord Holt was, that the Writ is only recited in the Declaration. And to shew that an Omission in a Declaration cannot be supplied by Matter in the Writ, even in the Common Pleas, he cited *Cro. Car. 407.* where *Vi & Armis* was in the Writ, but left out of the Declaration, and held bad. Judge Page and J. Probyn were of the same Opinion. But Judge Lee said, he had a Note of the Case of *Bagnes and King*, *Mich. 13 Will. 3.* where *vi & armis* was in the Writ, and omitted out of the Declaration; and after Judgment by Default the Court held this to be good. And he said in that Case, the Case out of *Lutw.* mentioned now by Mr. Strange was cited. He said farther, that as this Motion has prevailed in the Common Pleas he was for affirming the Judgment. However the Matter stood over.

Vide post

Marshal and Carleton.

IN an Action brought against the Defendant for a Devastavit of What shall
 his Wife; the Defendant pleaded, *quod petit Judicium de Billa*, be said to be
 for that it was not said in the Bill, that she was Administrator a Plea in
 of her former Husband; and concludes his Plea, *quod Billa cas-* Bar, what in
setur. To this the Plaintiff replies, *quod ab actione sua præcludi* Abatement.
non debeat, and so demurs in Bar; and a Joinder in Demurrer.
 Mr. Acherly for the Plaintiff objected, that there was no Fact
 alleged in the Plea, which the Plaintiff could take Issue upon;
 and for that Reason he was justified in Demurring. But Mr.
 Reeves on the other Side argued and said, that he did agree,
 wherever a Defendant begins his Plea with a *petit Judicium de*
Narratione, or concludes it so, the Plea is a Plea in Bar; but
 in the present Case the Beginning and Conclusion is both to the
 Bill; and therefore this was a Plea in Abatement. The Plain-
 tiff consequently did wrong in demurring in Bar; for by that
 Means he has made a Discontinuance; and accordingly he
 prayed

Vide post

prayed Judgment for the Defendant. And by way of Authority cited Salk. 218. The Chief Justice agreed with Mr. Reeves, that his Distinction between a Plea in Bar and a Plea in Abatement was right; however ordered this Matter to stand over.

Hilly and Polhill.

What shall
not be said to
be a good De-
claration in
Debt upon
an Award.

IN Debt upon an Award the Plaintiff declared, that the Defendant had given his Bond to stand to the Award of J. S. and that J. S. awarded, that the Defendant should pay the Plaintiff such a Sum at the Cock and Pye in Darson; but that the Defendant did not come there. The Defendant prays Oyer of the Bond, and of the Award; and upon Oyer the Award recited, that there had been several Controversies between the Plaintiff and Defendant; particularly one relating to the present Matter, and another relating to a different Matter; and the Conclusion of the Submission was, that all Matters in difference were thereby referred to the said Arbitrator, ita quod he made his Arbitration of them all by such a Day. The Determination then upon the Award was, that the Defendant should pay the Plaintiff the Sum in Question, that the Plaintiff should pay the Defendant 1 s. and thereupon mutual Releases were ordered to be given. And this Award appeared to have been made within the proper Time. The Defendant upon this demurs generally to the Declaration. And now Mr. Filmer argued, that the Demurrer might be well maintained. He said, he should submit it, that as this Action of Debt was brought upon the Award, and not upon the Bond, the Plaintiff ought to have set forth in his Declaration, that he had submitted himself to stand the Award, in Order to shew, that both Parties were reciprocally obliged to perform it. But as the present Declaration is drawn, the Plaintiff does not at all appear to have been bound; there is no Remedy therefore, that the Defendant has for the 1 s. awarded to him; and till that is done, no Releases are to be given of either Side. The Court thought there was a good deal of Weight in this Exception. However the Matter was ordered to stand over.

Vide post.

The King and The Inhabitants of Stilton.

The Cer-
tainty re-
quired in de-
scribing the
Children of
a Person that
is removed.
Vide post

AN Exception was taken to an Order of two Justices, for that it was made for the Removal of a Man, his Wife and one Child, without ascertaining the Child to belong to the Man and his Wife. And accordingly the Court made a Rule to shew Cause, why the Order should not be quashed as to the Child.

The King and Morrice.

What shall
be said to be
a good Cap-
tion of an
Indiament.

IN an Indiament for exercising a Trade contrary to the Statute of 5 Eliz. Mr. Hopkins moved in Arrest of Judgment, that this was an Indiament taken at the Quarter-Sessions, and it was not said in the Caption, that the Jury who found it, were

ad-

ad tunc & ibidem onerat; only in general, that they were onerat. And for Authority cited 2 Keble 583, 610. 1 Ven. 60. and 1 Mod. 26. Mr. Fazakerly on the other Side did allow, that many such Exceptions as these, were thought fatal formerly; but of late the Judges have got over them. Particularly he said, it has been allowed to be a good Exception to an Indisment taken at the Sessions, that the Justices did none of them appear to be of the Quorum, but in Sid. 367. that Exception appears to have been disallowed. The same is of the Exception of the Want of proborum & legalium hominum. So it has been formerly held to be a good Exception, that the Names of the Jurors were omitted, but that Exception has of late Years been over-ruled. The Court did agree, that the Exceptions cited, have been of late disallowed; but never knew the present one to be so. Accordingly the Judgment was arrested.

Staniford and Ayselby and others.

ON Rule to shew Cause, why a Verdict should not be set aside, and the Defendant, who was Attorney in the Cause, as well as one of the Parties, answer the Matters of an Affidavit for raising the Nisi prius Roll. Mr. Marsh submitted it to the Court, that the Rasure was entirely in an immaterial Place. The Action was in Replevin; and the Defendant avowed pro redditu unius Anni Anglice one Year's Rent solubil existent. He did allow, the Defendant struck out the Word solubil and inserted the Words in aretro. But if this should be a Foundation to grant an Attachment against the Defendant, there could be none to set aside the Verdict, the Evidence upon one Issue and the other being necessarily the same. But the Court said, they would not enter into the Consideration, whether the Rasure altered the Issue or not. Accordingly made the Rule absolute with Costs.

The Remedies for erasing a Record.

Anonymus.

MR. Draper moved to make a Rule absolute for quashing the Plaintiff's Writ of Error; and that with Costs. But the Chief Justice said, he well remembered the Case of one Atwood, who brought seven or eight Writs of Error, which were all quashed; and yet no Costs given. Accordingly none was given in this Case.

When a Writ of Error is quashed, how far no Costs shall be ordered to be paid.

Anonymus.

MR. Cooke moved for Liberty to charge a Man in Execution, who was in Custody at the Gate-house for a Criminal Offence. The Chief Justice at first doubted, whether they could make such a Rule. However upon talking with the Master, the Court at last gave Liberty to do it.

When a Person is in Custody for a Criminal Offence, how far he may be directed to be charged with a Civil Action.

Anonymus.

How far several Offences must be joined in one Information.

MR. Hopkins moved for several Informations against different People for a grievous Battery; but the Court said, in these Cases all the Offenders are joined in one Information.

Haynes and Bennet.

How far Liberty shall be given to amend without Payment of Costs.

Serjeant Baynes moved for Liberty to amend a Record by the Bill filed, in making it a special Memorandum; and that without Payment of Costs, or Liberty to plead de novo. He did agree, that the Declaration in this Case had been delivered generally. He did agree too, that the Defendant had demurred generally, but yet he submitted it, if the Defendant did demur for this Exception to the Declaration, it was his Folly to do it; because he knew, the Plaintiff might amend; and if he did not demur for this Reason, there was no Occasion for any of these Terms being put upon the Plaintiff. And he said, he remembered this Point was expressly determined for him in the Case of *Walmesley and Cossey*, Pasch. 2 Geo. 1. But the Court said, it is known to be every Day's Practice, that these Terms are constantly put. And one of the Officers informed the Court, that when a Declaration is delivered with a general Memorandum, they have no Authority to make up the Record with a special One, tho' there be a Bill filed with a special one, and the Court said, the Plaintiff may make such a Mistake in the Declaration, on Purpose to draw the Defendant into a Demurrer. And therefore they would not grant this Motion but upon those Terms.

Speak qui tam and Born.

Vido 377.

THE Plaintiff having declared in Prohibition, this Matter now came on again upon Demurrer to the Defendant's Plea. And for the Plaintiff Serjeant Eyres argued, that there were divers Authorities in the Books, which declared a Clerk to be a temporal Officer; particularly he cited *Palmer* 379, and 2 Cro. 670. And no Distinction taken as to the Manner of his coming in. But if that Point was to be given up, still upon the general Nomination of the Parson, he has an Estate for Life in the Office; and then this Court has a Right to grant its Prohibitions, and prevent the Spiritual Courts from depriving such Officer. And to this Purpose he cited 2 Brownlow 11. in the Case of a Chancellor of a Diocese; and so it is in the Case of a Register. He insisted farther, that the Ecclesiastical Courts had no Authority to require a Clerk to take a Licence. Serjeant Chappel submitted it on the other Side, that whatever the Authority of the old Books may be, that the Office of Clerk is temporal in its own Nature; yet he said, of late the Court has

has taken a Distinction between the Manner of his coming into the Office. And this appeared from the Case of Townsend and Thorpe, where this Court allowed the Spiritual Court to proceed in depriving a Clerk, where he was nominated by the Parson; which they would not have done, had he been elected by the Parish. He then observed, that the Nature of this Office made it unfit, that it should be supplied by a Deputy. Personal Qualifications are required in a Clerk, by the 91st Canon, in 1603. He must be twenty Years of Age; able to write and read; and of a competent Understanding in Singing, if it may so be. And Gibson in his Construction upon that Canon says, they were originally Assistants to the Minister. He took Notice too, that in general these inferior Officers cannot make Deputies. A Constable cannot but in Case of extreme Sickness or Infancy, or where a Woman is appointed by Custom. So is 2 Keb. 309, 355. Then as to the taking a Licence, he did agree, he knew no direct Authority for it; but a Lecturer is certainly obliged to do it; and he submitted it, this Case was within the same Reason with that. The Chief Justice said, that he never remembered any express Resolution, that a Clerk was a temporal Officer. And as to the Case of Townsend and Thorpe he owned, he was at present not sufficiently certain, what that Case went upon. But as to the Licence, he questioned much, whether it was necessary. J. Probyn said, he thought he well remembered, the Case of Townsend and Thorpe went upon that single Point, that the Clerk there was absolutely an unfit Person to execute the Office; and therefore this Court would not hinder the Ecclesiastical Courts depriving him; as this Court had no Method of doing it themselves; and he thought, the Court then made no sort of Distinction between the different Methods of a Clerk coming in. And as a farther Case to shew, that in general a Clerk of a Parish is considered a temporal Officer; he cited the Opinion of Lord Holt, 6 Mod. 253. Judge Lee likewise cited a Case out of Salk. 536. where it is held, that a Clerk of a Parish, tho' nominated by the Parson, gains a Settlement, within the Statute of 9 & 10 W. & M. as executing a temporal Office. And as to a Lecturer's taking a Licence, he said, that is wholly by Statute. Judge Page too inclined to think, he was in all Cases to be considered a temporal Officer. However this Matter stood over.

Vide post.

Dr. Bently qui tam and The Bishop of Ely.

THIS Matter coming now on to be argued again, Dr. Henchman spoke to the Objection started by the Court, in relation to the Statute of Eliz. He said, in the present Case the Founder of this College was King Hen. 8. he gave no Statutes; the Consequence of which was, that his Successor King Edw. 6. might. For, as by Law the Right of Visitation descended to him over this College; so he might declare to the College, by what Rules they should be visited. But then he submitted it to the Court, as a Question deserving their Consideration, whether the Heir of the Founder, that is, the Heir of him, whom

Vide 192.

whom the Law declares to be the Visitor, can do any Thing more, than oblige himself and the College to observe those Rules during his Time. For no Part of the College Revenue came from him; therefore he can put no other Laws upon the College, but such as he has necessarily a Power of doing by the Visitorial Power descending upon him, which is barely for his Life. And this is known to be the Case of every appointed Visitor. Injunctions they may grant during their own Times; but those Injunctions will not bind their Successors. Therefore he insisted, that the Bishops of Ely for the Time being, could exercise this Right of Visitation in the Room and Place of Edw. 6. during the Reign of Edw. 6. only. And consequently the Bishop's Right of Visitation in the present Case, is under a new Appointment by Queen Elizabeth. M^r. Harper argued of the same Side, but made Use of a different Train of Thought, from what the Doctor did, that argued before him. He admitted, that the Statute of Edw. 6. in appointing a Visitor, were binding Statutes upon himself and his Posterity. No one yet ever doubted, but an Heir of a Founder, might give Statutes for the Government of the College, which would be binding upon his Heirs for ever, where the Founder himself omitted to give any; therefore he saw no Reason, but he might give Statutes relating to the Right of Visitation. And consequently the Right over the College, as Heir to the Founder; and the Right over the College as an appointed Visitor, are Rights intirely different. If this then is to be admitted, that Edw. 6. might appoint a Visitor for ever, he said, the Words in the Statute of Edw. 6. would plainly convey such a Right. The Words indeed are only *Episcopus Eliensis Visitor sit*. But they relate, not to the Person of the then Bishop of Ely, but to the Bishops of Ely for the Time being, by the Name of their Office. He then insisted upon it, that the Statute of 40 Eliz. had no Intent to confine this Right of Visitation over the Master only; the Words of the Statute not being *specialis Visitor*; but *Visitor specialiter admissus* by the Statute of Edw. 6. And he observed, that the Citation likewise was not by the Bishop, as special Visitor of the Master, but according to the Statute of 40 Eliz. But however, he said, tho' he did think it manifest, that the Bishop of Ely subsisted general Visitor under the Statute of Edw. 6. yet he submitted it, that the Statute given by Queen Elizabeth, were good; as they related only to the Government of the College, and did but explain the Statute of Edw. 6. But admitting, that they had been contradictory, yet he insisted, they might be well maintained; as the College have thought fit to accept of them. In this Respect he compared the present Case to that of every Corporation, that is appointed for the publick Government of a Town. The King indeed cannot compel them to take a new Charter from him; but if they do accept it, such Acceptance shall bind them and their Successors. And as to what is said in *Skinner* 513. he submitted it, that was very consistent with this Notion, He did allow, it was said there, that after a Founder has made Statutes, he cannot give the College new ones; but that might be well understood, that he cannot impose new Statutes upon them; and by no Means

Means intimates, that the Body cannot consent to new ones. And he apprehended such Acceptance might be of so much Influence, as in the present Case even to have taken away the Right of Visitation from the Bishop of Ely, if the King and the College had thought proper; for this Right did not accrue from any Grant of the King to him; but merely from an Act done between two Strangers. And therefore this Case falls within the common Rule of *quodlibet dissolvitur eodem modo quo contrahitur*. What he had hitherto said, he observed, related to Colleges of private Foundations, as well as those of Royal Ones. Authorities he had none to lay before the Court; neither did the other Side pretend to any. But that this Power of adding new Statutes by the Heirs of a Royal Founder, has been constantly exercised, he said, was notorious in Practice; and that, he hoped, would be allowed to be some Evidence of a Right, according to the Case in 2 Cro. 45. The Court said, they were very clear of Opinion, that the Words *Episcopus Eliensis Visitator* sic extended to the Bishops Successors for ever. And therefore that Point they would not consider of any farther. They said likewise, they did believe in Fact the Kings of England have given Statutes to other Colleges, besides those of their own Foundations. So likewise Mandamus's have been granted to admit Fellows of Colleges. But Judge Page said, that was done only in those Times, when Colleges were considered as Ecclesiastical Foundations; and so the Crown exercised this Power, as Head of the Church. Judge Lee said likewise, that he did not take this Case to be any Thing like that of publick Corporations. For there the King exercises this Power with the Consent of the Corporation, as being entrusted with the publick Government himself. They all agreed, that the general Question, that had been spoke to, was a Matter of great Consequence and Difficulty. And therefore it was ordered to stand over for the Opinion of the Court.

Vide post.

Ball and Knipe.

UPON a Writ of Error on a Judgment in the Court of Bristol, given in an Action brought upon a Policy of Assurance, Mr. Reeves assigned for Error in the first Place, that the Court below had granted a *Tales de Circumstantibus*; whereas the Statute allows of this only in Trials by *Nisi prius*. The Words of the Record are; *Ideo secundum Consuetudinem Civitatis prædictæ ad requisitionem querentis alii de Circumstantibus jurat*; quorum Nomina apponuntur secundum formam Statuti in hoc casu, &c. In Answer to this Exception Mr. Filmer said, that a Custom of this Sort would be good; and this is laid to be secundum Consuetudinem. But Mr. Reeves observed, that this Answer was not sufficient, in the first Place, because the Usage is laid to be of the City; whereas it should have been of the Court; and in the next Place, because the Court appears to have had its Jurisdiction within Time of Memory. For the Style of the Court is, *secundum legem Mercatoriam ac secundum consuetudinem Usitatam infra dictam Civitatem, ac etiam secundum diversas Libertates per di-*

What Courts have a Right to grant a *Tales de Circumstantibus*.

What shall
be a good
Declaration
in an Action
brought
upon a Poli-
cy of Assu-
rance.

versas Literas Patentes. He said besides, that the Plaintiff had laid no Cause of Action in the Declaration; and this may be assigned for Error, tho' in the present Case there was a Verdict. The Exception, which he principally relied upon to this Purpose was, that no Time was ascertained in the Policy of Assurance, as it is set forth in the Declaration, from which the Hazard of the Ship was warranted; for it is only said, Incipient Periclitamine super prædict', Anglice

Ship is said to be Oneris Anglice, Tons, without saying what Burthen the Ship was of. Likewise the Ship is said to be warranted, Mancipi vel non Mancipi Anglice, Interest or no Interest. But the Word Mancipium has a very different Signification from that of Interest. Then he said, the Danger insured against was to be suffered hic, and not laid upon the Sea or in the Voyage. The Court said, that at present they took the Answer to the first Exception to be sufficient; and that it was not avoided by any Thing Mr. Reeves had said; for the Court is held for the City; and therefore the Usage of the City is the Usage of the Court. And they thought the mentioning the Letters Patent related only to such Liberties, as were added by them. Then to the second Exception, they thought the Policy of Assurance might be well intended to take Effect from the making of it. That was 26 Feb.

The Ship is said to have set Sail the same Day, and then the Words super prædict' must refer to that Day. To the two next Exceptions, the Court did not think, they could be taken Advantage of after Verdict. And they thought, the last Exception could not make the Policy of Assurance void. However this Matter stood over.

Vide post.

Coke and Chapnes.

The Remedy for an Escape.

IN an Action upon the Case brought by the Plaintiff qui tam, &c. against the Sheriff of Derby, for an Escape of one Darford, taken upon a Capias Utlegatum in mean Process. Mr. Gapper had obtained a Rule to shew Cause for arresting the Judgment, for that he insisted the Action would not lie. Mr. Draper came now to shew Cause, and mentioned two Cases, one in Cro. El. 652. the other in Cro. Jac. 360. where this Action had lain. And he said in Lutw. 122. it is determined, this Action will lie for an Escape on an Excommunicato capiendo in mean Process. But Debt he did agree would not upon the Statute of Rich. 2. Mr. Gapper on the other Side said, that the Plaintiff is at the End of his Suit, when the Defendant is taken upon a Capias Utlegatum in mean Process, and must begin his Action de novo; for which Reason, he submitted it, that the Escape was no Prejudice to the Plaintiff. And to this Purpose he cited 13 H. 4. 1. Then in Answer to the first of these Cases, cited on the other Side, he said, it did not appear, whether the Capias Utlegatum was in mean Process or not; and as to the second, he said, this Exception was not taken. Judge Page said, upon an Application to the Court of Exchequer, they would Order the Defendant's Goods in this Case, that have been taken upon the Capias Utlegatum, to be assigned over to the Plaintiff, And the Court thought

thought the Plaintiff suffered an Injury by this Escape. Accordingly gave Judgment for the Plaintiff.

The Mayor of the City of London and Swinland.

ON Rule to shew Cause, why the Defendant, who was Collector of the Dyphan's Tax, should not have Inspection of the Publick Books relating to the Dyphan's Tax, and take Copies of them at his own Expence, Mr. Moreton said, that the Chamberlain, in whose Custody these Books are, was willing, that the Defendant should take Copies of those Parts of them, which any Ways related to him. But submitted it, he had no Right to take Copies of the whole, nor of such Parts of them, as did not relate to him. Accordingly he apprehended, that the Rule that had been drawn up, was too general. Mr. Bickland on the other Side argued, that this was the common Form, which all these Rules are drawn up in. However the Court (Chief Justice absent) said, that the Rule should not be so general; and accordingly made it, that the Defendant should have Inspection of all the Books, which related to this Tax; and take Copies only of such Part, as concerned himself.

When a Rule is made for the Inspection of Books, in what Form it is to be drawn up.

Holt and Ward.

THIS Matter was now argued by Dr. Andrews on the Part of the Plaintiff, and Dr. Sayer on the Part of the Defendant. Dr. Andrews said, that the Question that has been so long before the Court, was singly this, whether the Defendant could have had any Redress in the Ecclesiastical Courts against the Plaintiff, in Case she had refused completing this Engagement on her Part, and he had been willing to have completed it on his. This, he said, was the State of the Question; and he observed, it has come before the Court in two Ways; one, a Case made at the Trial upon the Plea of the general Issue; the other a Demurrer to another Plea of the Defendant, viz. Infancy in the Plaintiff. Upon the Record it is confessed, that the Plaintiff was above the Age of Consent to Marriage; it is confessed likewise, that the Defendant promised to marry the Plaintiff, before the End of May in a certain Year; that this Promise was founded upon a mutual One on her Part to marry him; and it is likewise agreed, that it was fully proved upon the Trial, that her Mother, who was her Guardian, as her Father was dead, was privy and consenting to this Engagement. And according to the Civil Law, he took Notice it was a general Rule, that an Infant was bound by all Promises made on his Part, which his Curator consents to. But in Contracts of Marriage, their Law allows of Infants in a peculiar Manner to act for themselves. In other Cases it is a general Rule, that no Suit can be instituted against them, but they must defend it by their Guardians; but in Suits for Solemnization of Marriage, the Law dispenses with this. To this Purpose he mentioned the Case of Cole and Coventry, which came before Dr.

Vide ante 348.

D^y. Oxenton as Judge of the Court of Arches, on an Appeal in the Beginning of King William's Time. Coventry had instituted a Suit for Solemnization of Marriage; and upon an Appeal it was objected, that he was a Minor, and had instituted his Suit without a Guardian; but it was held that the Suit was well instituted notwithstanding. He said, he did own, that that Suit was founded upon a Contract of Marriage per verba de presenti; but he did believe, that no Instance could be mentioned of any Suit being established upon a Contract per verba de futuro within the Memory of any Man. Notwithstanding this, he said, the Authority in their Books is various, that such Suits may well be brought. The Manner of enforcing this Suit, he did agree, was not so certain. In some Books it is intimated, that the Court can only inflict Penance upon the Party pro lesione fidei; but in others it is said, that they may decree a specific Execution of the Promise; and the Consequence of disobeying such Decree, is Excommunication. And for Authority he cited Swinburn, Sect. 17. Tit. the Effect of Espousals No. 1. Covarubius de sponsalibus, Cap. 4. No. 2. Page 120. 5 Mod. 412. Modern Cases 115. On the other Side D^y. Sayer argued, and said, it must be agreed to him, that the Distinction taken between a Contract per verba de presenti & per verba de futuro is purely by the Canon Law. But by that Law a Contract of Marriage per verba de presenti is an actual Marriage; and therefore he might well agree the Case of Cole and Coventry before cited. He said, he did agree farther, that in Contracts per verba de futuro, where the Party has confirmed such Contract by an Oath, the Courts have sometimes interposed, and inflicted Penance upon the Party for the Breach of it. But in Prynne, Tit. De Sponsalibus, the Case is put of a Man and Woman's entering into such Promise and the Man's going beyond Sea; and held expressly, that the Woman is free to marry another Man. He said likewise, that he submitted it to be contrary to the very Nature of Matrimony to decree a specific Performance of such Contracts. And if the Man, that has entered into such an Engagement, should take to Wife another Woman, he said, it was beyond all Question, that their Courts could not annul the Marriage actually entered into, and decree a Solemnization of the Marriage only contracted for. The Court said, that they desired now some farther Light into this Question to be given them by the Common Lawyers; and therefore this Matter was ordered to stand over to be spoke to by them.

Vide post.

The King *and* The Inhabitants of Melton.

MOTION was made to quash an Order of Sessions, discharging an Order of two Justices, for the Removal of the Widow of John Coke and several Children. John Coke removed himself with his Family from the Parish of Stapleford with a Certificate, and lived in a Mill within the Parish of Milton, which Mill maintained its own Poor, and occupied there a Tenement of 3 l. per Annum. and at the same Time rented a Tenement of 40 l. per Annum in the Parish at large. The two Justices were of Opinion, this gained a Settlement in the Parish of Milton; and the Motion now made was, that the Order of Sessions, discharging that Order, might be itself discharged. And the Court made a Rule to shew Cause.

How far a Person shall gain a Settlement in a Vill.

Vide post

Philips *and* Knightley.

THIS Matter coming on again, Serjeant Eyres argued, that the Award was neither final nor certain, for in the first Place it does not put an End to the Controversy then subsisting; and in the next Place, it is uncertain what the Costs of that Action are. But Mr. Reeves on the other Side submitted it, that it is not necessary, that an End should be put to the Controversy by the Award itself; it is enough, that the Award puts the Matter into a Method of being ended. To this Purpose he cited the Case in 1 Cro. 541. And observed, that the Case in Carth. 378. is not at all against this; for there the only Thing determined is, that in Award to make general Releases, the Award does not put an End to the Controversies, and therefore cannot be pleaded in Bar to any Actions brought upon them, but the Releases may. And besides it was said, that the Arbitrators could not have awarded the Party in this Case to have discontinued his Action; for it is brought on Behalf of himself and the Poor of the Parish. Then as to the Matter of Costs, he did agree, if the Award had been, that the Party shall pay such Costs, as shall be taxed by a Stranger, that would not have been good; but here it is, that the Party shall pay the Costs of such a Suit in general; and these may be taxed by the Officer of the Court. The Chief Justice, Judge Probyn and Judge Lee were of this Opinion. But Judge Page doubted. He did agree, that an Award, that one of the Parties should give to the other a Bond for such a Sum, would be good; but he did not know, that a Bond awarded to be given, that one of the Parties shall do a collateral Act would be so. And as to the Matter of Costs, he did agree, that if it had been expressed in the Award, that the Matter should tax the Costs, that would have been sufficient; but as it is left in general, he thought it not so. Accordingly the Court ordered this Matter to be put into the Paper again the last Paper-Day of the Term for the Resolution of the Court.

Vide ante 387.

Vide post

Davis and Johnson.

How far the
Rule of Law
is that an
Heir at Law
shall not be
disinherited
by a Will,
without a
necessary
Implication.

THIS was a Matter, which came before the Court upon a Case made at the Trial in an Ejectment. The Doubt arose upon the Construction of a Will of one Matthew Trig. The Will recited, that his Wife Rebecca was with Child, and took Notice likewise of the great Care she had taken of him in his Illness; and then provided, that if she should be delivered of a Son, that Son should have the Moiety of his real Estate at his Age of 21, and if she should be delivered of a Daughter, that Daughter should have the same. And as to the other Moiety, after the Death of his said Wife, he gave the same to his Brother Thomas Trig, and his Sister Mary Hogland for their Lives, if they should be living at the Time of her Death, and if they should not, then to his Brothers and Sisters Children. And then the Will went on and provided, that if the said Rebecca should be delivered of no Child alive, or if such Child should die before the Age of 21, then he gave his whole real Estate to the said Rebecca for Life. The Testator died in 1691, and Rebecca was afterwards delivered of a Daughter, who came to the Age of 21. The Daughter was Heir at Law to her Father, as well as Devisee. Rebecca makes a Feoffment of that Moiety, devised to the Testator's Brother and Sister after her Decease, to the Defendant. And now in an Ejectment brought by the Plaintiff on a joint and several Demise of this Moiety from the Daughter and the Brother's and Sister's Children (the Brother and Sister dying in the Life of Rebecca and after the Feoffment made by her) the Question was in the first Place, whether Rebecca had an Estate for Life in this Moiety at the Time of the Feoffment; and in the second Place, admitting that she had, whether the Interest to the Brothers and Sisters Children was a contingent Remainder, so as it might be destroyed by the Feoffment, or whether they took by way of Executory Devise. Serjeant Skinner argued for the Defendant, and said, he submitted it, Rebecca had clearly an Estate for Life. He did agree, that the Cases had gone so far in Favour of Heirs at Law as to allow, that if Lands are devised to a Stranger after the Death of a Man's Wife, the Wife shall have nothing by this Devise; but the Lands shall descend to the Heir, till the Death of the Wife happens. But he did apprehend, the Cases had never gone so far, as to allow the Lands to descend to the Heir in such Case, where there is an express Devise of a Moiety to the Heir. The Court said, that they did agree, that an Heir may be disinherited by Words of Implication, where such Implication is necessary to make the Words of the Testator take Effect. And therefore it must be allowed, that if Lands are devised to the Heir at Law, after the Death of another, that other takes an Estate for Life. But where-ever the Implication is not absolutely necessary, the Rule of Law is established and certain, that the Heir shall not be disinherited of any Part. And in the present Case the Implication is not so; for the Devisor might well intend, that

that this Society should descend to his Heir during the Life of his Wife; and that the other Society should come to him by Purchase under the Will. The Court said farther, that the determining this Point would determine both; for if Rebecca had not an Estate for Life, it is certain her Feoffment could not disturb the Interest limited to the Brother's and Sister's Children. Accordingly they refused to hear any farther Argument; but gave Judgment for the Plaintiff.

The King and The Lady Lawley.

THIS Matter coming now on to be argued again, Ser.^{Vide antea} jeant Hawkins said, that he believed, he might rely upon it, ^{287.} that Sciens was not a sufficient Allegation, that the Defendant knew of the former Indictment against Croke; and for this he cited 5 Rep. 122. in the Instance of dans mortale Vulnus, where that is held to be insufficient. But if he should give up that Point, still he submitted it, that it was not enough for this Indictment to charge, that the Defendant knew that an Indictment was found against Croke, which Indictment, it was said, is in the following Words, and so that Indictment recited Verbatim; but it ought to have been averred, that there was such Indictment. To this purpose the Case of The King and Tracey, was cited out of 6 Mod. 31. There the Defendant, who was a Justice of Peace, was indicted for procuring another Justice to refuse Bail in a Case, which was bailable. Two Exceptions were there taken; one, for that it was not averred in the Indictment, that Bail was refused; the other, that it was not averred, that Bail was offered. And the Judgment arrested upon these Exceptions. But the Serjeant farther argued that there was another material Reason, why this Fact ought to have been averred, which is, that if it had, the Recital of this other Indictment must have concluded *propterea patet per Recordum*; and by that Means the Defendant would have had a Right of pleading *Nul tiel Record*. And so is Rast. 145. in the Case of a *Decies tantum*. But by this Indictment's being in that general Manner as it is, this Conclusion is quite omitted, and so the Party prevented of such a Trial, which by Law he was intitled to. Mr. Marsh spoke too of the same Side, but confined himself to some Authorities in the Law, relating to the Word *Sciens*. And for this purpose he cited 4 Rep. 18. b. where the Reason given, why *Sciens ad Mordendum oves*, &c. is not traversable, is, because it is not a sufficient Allegation, upon which a Traverse can be taken. He relied too upon a Case in 2 Bulst. 292. There in Replevin the Plaintiff replied an Acceptance of Rent by the Assignee from the Avowant, *Sciens* that he was Assignee. And yet held, that the Allegation was not insufficiently laid. Mr. Reeves on the other Side argued, and said, he should submit it, that no more certainty is required in an Indictment, than is in a Declaration. And so the Rule is laid down in the Case before cited out of 5 Rep. Then that this would be good in the Case of a Declaration, he thought, was beyond all Question. For as to the Case cited out of 4 Rep. that

that he submitted it, depended upon a particular Reason; and not upon the Reason mentioned in that Report. The Reason clearly, he said, was, because the Travelling that Fact would be pleading a Plea; which amounted to the General Issue. Then as to the Recital of the former Indictment not concluding *prout patet per Recordum*; he took it to be a positive Rule, that this was never necessary in Indictments. And the Reason is, because that Fact must always be proved upon Evidence; whereas in Declarations, that may happen to be otherwise by particular Pleading. He said, the various Precedents cited upon the former Argument shewed this to be the Law; and he took it, in Indictments for receiving stolen Goods, never any Thing more is alledged than that the Defendant knew the Goods to be stolen. So Mr. Strange said, in the Appendix to the State Trials, there is an express Precedent of this being sufficient even in an Indictment of High Treason. That was in the Case of The King and Hayes, Mich. 36 Car. 2. The Defendant there was indicted, for that he, knowing Sir Thomas Armstrong was indicted of High Treason remitted him Money. This Exception indeed was not taken there; but the Defendant was acquitted upon the Evidence. The Chief Justice said, that the Reason given by Mr. Reeves for the Case of the *Sciens canem*, &c. was certainly the right Reason; and he was of Opinion, the *Sciens* was sufficient in this Case. He said, he principally relied upon the Authority of the various Precedents, that have been cited. And as to the Recital's concluding with *prout patet*, he took it not to be necessary in Indictments. He did agree the Case of the *Decies tantum*; but that, he said, is an Action. Judge Page declared himself to be of the same Opinion; and said, he took it, the *Sciens* was stronger laid, than if it had been *quod sciebat*; for this participle speaks of the present Time, whereas the *quod sciebat* would not. Judge Probyn said, he thought the same, and cited a Case out of Sid. 183. And Judge Lee said, he remembered a particular one to this Purpose, which was that of The King and Logwyn, Pasch. 3 Geo. 1. The Defendant there was indicted, for that he being Chancellor & *sciens* that such a one had proved a Will in the Prerogative Court *colore Officii* compelled him to prove it again in his Court. Serjeant Pengelly moved in Arrest of Judgment, that it was not enough to charge the Defendant with knowing this; but it ought to have charged him with knowing it judicially. Lord Chief Justice Parker, said, that the Words, knowing it, was as strong as, an Averment, that he did know it, and it must be supposed he knew it, by seeing the Seal in that Case, two of the other Judges were of the same Opinion; and he never knew, that any Thing more was done upon that Exception. Accordingly in the present Case the Court gave Judgment for the King.

The King and Crooke.

THE Defendant being now brought up again, the Court declared, that they were unanimous in Opinion, that the Defendant's Crime was within the Clause of the Statute of Eliz. that has been mentioned. For the plain Words of this Clause are, that whoever forges a Feed with an Intent of Disturbing the Freehold of another, shall suffer the Penalty of it; though he does not actually charge or disturb it. Accordingly Judgment was pronounced for the King.

Vide ante
168.

Wilmot and Allen.

ON Rule to shew Cause, why an Attachment should not go against the Defendant for not performing an Award, Mr. Fazakerly produced Affidavits to explain the Nature of the Submission, in order to shew that the Arbitrators had went beyond their Authority, and that they had acted corruptly in making their Award. He said, he was well apprehensive, that it would be objected against him, that this Submission was made a Rule of Court in Pursuance of the Statute of King William, and therefore no Objection could be made as to Corruption, as the Time appointed by the Statute for this Purpose was long since elapsed. But he did submit it, that this Objection may at any Time be made in shewing Cause against an Attachment; though he did agree, it must be made before the End of the next Term after the Award, when the Objection is made use of to set aside the Award. And in Pursuance of this Distinction, he said, many Cases have been determined. In the Case of Merry and Edwards, in Lord Macclesfield's Time, he laid down the Rule to be, that where an Award is subsisting by Rule of Court at Common Law, the Party comes too early to object to the Award for any Cause, till an Attachment moved for; but where it is made in Pursuance of the Act, the Party must apply the next Term after the making it, if he would move to set it aside for Corruption in the Arbitrators; however that he may at any Time shew this for Cause on Motion for an Attachment. The same Rule of Distinction in Relation to Awards made on the Statute was laid down, he said, in the Cases of Whild and Kneeves, Mic. 10 Ann. of Bird and Pye, Mich. 9 Geo. 1. and Swanton and Fair, Hill. the same Year. He said likewise, that the Arbitrators had allowed Letters to be produced in Evidence before them, writ by the Party himself, whom they made their Award in Favour of. And that he submitted it was another Reason for setting it aside. The Court said, that they did not think either of these Facts sufficiently made out, of charging the Arbitrators with going beyond their Authority, or with Corruption in executing it. And therefore there was no Occasion to give an Opinion upon this Distinction, that has been offered. Then as to the last Exception, they thought the Arbitrators had a Right to make use of whatever

When an Attachment is moved for, for not performing an Award, what Matters may be offered against the Granting it.

Evidence they required to inform and settle their Judgments. Accordingly the Court made the Rule absolute for granting the Attachment.

Gardiner and Merret.

How far two Names shall be said to be materially different from one another.

How far the Court will amend a Writ of Error ex officio.

How far Costs shall not be paid upon the Amendment of a Writ of Error.

Vide post.

UPON a Writ of Error on a Judgment of the Court of Common Pleas in an Action of Assault and Battery, Want of an Original was assigned for Error, and now an Original was certified, wherein Merret was Plaintiff, whereas in the Placita he is all along named Merroe; upon which Mr. Gapper insisted, that this was a material Variance. Mr. Robinson on the other Side argued, that these Names were eadem sonantia; and therefore this was no Exception at all. But at least, he said, the Plaintiff in Error could not take Advantage of this; for his Writ of Error is the same as the Original. However, if the Court should be of Opinion against him in both these Points, he desired, this Matter might stand over, that they might have Liberty to apply to the Court of Common Pleas, to see, if this could not be amended. The Court said, that they thought, the Variance was material; and mentioned a like Case in this Court, where Dunmol and Dunmal were held to be so. Then as to the Writ of Error being so too, they said, for the same Reason, that this was a material Variance between the Original and the Placita, it must be so too, between the Writ of Error, and the Record; and consequently the Record is not rightly removed up; for which Reason they could by no Means affirm the Judgment. However they declared their Opinions to be, that they might ex officio amend the Writ of Error by the Stat. of 3 Geo. 1. 13. without Application of either Party. For the Stat. says, every Writ of Error, varying from the Record, may and shall be amended by the Court, into which the Record is removed. Indeed they did agree, that in ordinary Cases it is usual for the Court not to do this, ex officio, but for the Party to apply for it. But the Reason for those Cases was, that the Party comes and informs the Court, that there is a Mistake in the Writ of Error, before the Record is removed up before them, and consequently before the Court can know it themselves. But here they see it judicially. They declared likewise, that the Plaintiff in Error does not pay Costs upon this Statute for the Amendment. And Mr. Monday said, the Practice must have been so ever since the Statute; because it is known, that the Amendment is made in Court instantaneously upon pronouncing the Rule. Accordingly the Court ordered the Amendment without Costs in the present Case; and gave Rule for the Cause to stand farther over, that the Party might have Liberty to apply to the Common Pleas, to see, if he could have his Original amended.

Philips and Knightley.

THIS Matter coming on again, Judge Page declared himself *Vide ante* to continue of the same Opinion, as he was of before, in ^{457.} the two principal Questions. He did agree, that he had found Reason to alter it in one of the Cases he had put before; and that was, in Relation to the Bond. And he did allow, if the Arbitrators had awarded, that Marshall should give a Bond to the Plaintiff to indemnify him in the Suit depending, that would have been good. For there the Arbitrators have ascertained the Penalty, as the Consequence of his not doing it. And tho' indeed by executing this Bond, the Party's Remedy upon the Arbitration-Bond is gone; yet there subsists as good a Remedy upon this Bond, as there was upon the other. But in the present Case, by executing the Deed of Covenant, the Party's Remedy upon the Arbitration-Bond is gone, and there is only a Remedy upon the Covenant left in the Room of it; which is a Satisfaction in Damages only to be given by a Jury. And he thought the Case in 2 Saund. 292. as strong a Case, as the present one. Then as to the other Point in relation to Costs, he thought the Case of Winter and Garlick, Salk. 75. full in support of his Opinion. And in the Case of Sebley and Russell, Mich. 9 Will. 3. where the Dispute was, how far Arbitrators might assign Part of their Authority to be executed by another, he remembered well, Lord Holt laid it down, that they could in no Case, but where they referred Costs to be taxed by the Master. The Rest of the Court declared their Opinions to be different in both Points. Judge Lee in particular said, that his Notion was, that Arbitrators are only bound to make as good an End of the Matters referred to them, as the Nature of them will admit of. So far indeed to be sure, he said, they are bound to do; or else the Award will be void. And therefore he did agree, that if the Award had been, that Marshall should be nonsuited in that Action, that would not have been sufficient. But no further they can be bound to do. And therefore the Arbitrators could not possibly award, that Marshall should discontinue the Suit, which he had brought on Behalf of himself and the Poor of the Parish; for that would be to divest an Interest out of the Poor of the Parish, which was vested in them by the Commencing the Action. Then as to the Matter of Costs, he said, to be sure the Arbitrators could not refer the Costs to be taxed by a Stranger; but when the Award is only in general, that the Party shall be indemnified from the Costs of such a Suit, he thought that was sufficient, and that the Court might order the Officer to tax them. To this Purpose, he said, was the Case of Eastland and Franks in this Court. There an Exception was taken to an Award, for its ordering the Party to pay such Costs, as the Master should or ought to tax; which it was said, was uncertain. But the Court held the Award to be good enough; and the Reason given was, that there was no Occasion for an express Reference to the Master. So, he said, he remembered well, there was a Case to the same Purpose in Cro. Car.

Car. but he could not indeed think of the Name of it. Accordingly the Court gave Judgment for the Plaintiff.

Fisher and Hughes.

The Form
of a Judgment to be
given in an
Ejectment.

IN a Writ of Error on a Judgment in Ejectment out of one of the Grand Sessions in Wales, Mr. Strange said, that the Plaintiff had declared on three several Demises of one and the same Tenement; and had a Verdict for him upon one Demise, and against him upon the other. But the Form of the Judgment was, *Ideo consideratum est, quod Querens recuperet Terminum suum prædictum upon one of the Demises; & quoad cætera præmissa, quod defendens ear inde sine die.* Upon which Mr. Strange objected, that the Word *præmissa* must relate to the Tenement; and as there is but one Tenement mentioned, here is Judgment given, that the Plaintiff shall recover it, and likewise, that he shall be barred of it. And this, he said, was intirely owing to the Plaintiff's not laying his Demises to be of different Tenements; as the common Form in these Cases is, by Way of *alia Tenementa*. The Court thought there was a good Deal of Weight in the Objection; so ordered this Matter to stand over.

Vide post.

Anonymus.

How far the
Court of Ex-
chequer will
grant a Writ
of Delivery
of a Ship.

MR. Ward moved for a Writ of Delivery of a Ship, that was seized the 29th of April last, upon Account of the Writ of Appraisement being not returned this Term; so that the Prosecutor had been guilty of a manifest Delay. The Attorney General objected on the other hand, that the Ship might be subject to be burned; and therefore this Motion was irregular. Baron Carter said, if this Motion was proper in itself, he thought at least it was made too early; for he took the Rule to be, that this Writ could not be granted, till the Party was delayed of a Trial. But the rest of the Court declared, they thought, any apparent Delay on the Part of the Crown was a sufficient Reason to grant it. And as to what was said in relation to the Ship's being subject possibly to be burned, they observed, that upon the granting these Writs, there is always a Recognisance given; and in that Recognisance there is a special Provision, in Case the Ship be subject to be burned. Accordingly the Writ was granted upon those Terms of the Parties entering into such Recognisance.

The

The King *and* The Inhabitants of Melton.

M^{R.} Abney now came to shew Cause, and said, he did agree, Vide 457.
 if this Case had subsisted upon the Statute of 13 & 14
 Car. 2. this Renting would have gained a good Settlement;
 but as it depends upon the Statute of 9 & 10 W. 3. 11. he sub-
 mitted it, that it could not; for the Words in that last Sta-
 tute are, that no Person, coming into a Parish with a Certifi-
 cate, shall gain a Settlement there, unless he rents a Tene-
 ment of 10 l. per Annum, or executes an annual Office in such
 Parish. Now the Word such must be applied to the Renting
 the Tenement, as well as the Executing the Office; and if so,
 the Renting the Tenement must be in such Parish, where he
 comes with the Certificate. M^r. Reeves on the other Side said,
 that he remembered a Case, which was determined upon Debate,
 where the Resolution of the Court was, that the Words in this
 Statute and those in the Statute of Car. 2. should receive the
 same Construction. That Case was Mich. 9 Geo. 1. and the Dis-
 pute there was between the Parish of St. John's, and the Parish
 of Annwell. Accordingly the Court declared themselves to be of
 the same Opinion; and Judge Lee said, he thought, the Word
 such, that has been relied on, might well be confined to the
 executing Offices. Upon which M^r. Abney took an Exception to
 the Order of two Justices, for removing the Wife of John
 Coke and six Children, without ascertaining the Names of the
 six Children, or saying, that they were her six Children. And
 in the Case of The King and Alders, Mich. 8 Geo. 1. which was an
 Order of Removal of a Woman and a Bastard-Child, he re-
 membered both these Exceptions taken, and the Order quashed
 upon them. In Answer to this M^r. Reeves said, that he well
 agreed, that the complaining Part of the Order was, as has
 been mentioned; but in the Adjudication-part it is said, that they
 were her Children; and therefore he hoped that was sufficient.
 However the Court were of Opinion, that this was necessary to
 be in the complaining Part; for upon that the Adjudication-part
 is founded. And accordingly they quashed the Order of Sessions
 in the Whole, and the Order of two Justices as to the Children;
 but confirmed it as to the Wife.

The King *and* The Inhabitants of Stilton.

T^{HIS} Matter coming on again, the Exception by M^r. Fil- Vide 448.
 mer seemed to be, that the Name of the Child was not
 mentioned; and not that it was not said, it was their Child.
 The other Side insisted, that M^r. Filmer did not cite any Autho-
 rity to shew, that this Exception was ever allowed. The Chief
 Justice said, if this was the first Case in which it was ever taken,
 he thought it ought to be allowed. And accordingly the Court
 made the Rule absolute for quashing the Order as to the Child.

The Inhabitants of Courland *and* The Inhabitants of Leeland.

Vide ante
379.

MR. Fazakerly now moved for the Opinion of the Court, and they all declared it unanimously to be, that the Indenture was void to this Purpose of gaining a Settlement, as well as all other Purposes whatever. And accordingly quashed the Order of Sessions, and confirmed the Order of two Justices.

Stock *and* Bell.

How far the
Court will
not give
Leave for the
Inspection of
Books.

*See 1. Term
Rep. 689.*

MR. Floyer moved for Inspection of a Contract, entered in the Books belonging to Greenwich Hospital, and signed by a Workman, who was obliged to bring an Action upon it. But Judge Lee said, he remembered a Motion of this Sort refused not long ago, even in the Case of Books belonging to Church-wardens; as a private Right was only concerned. Accordingly the Court refused the Motion in the present Case.

Anonymus.

How far it is
necessary to
give a Rule
to reply.

MR. Morley moved to set aside a Judgment in Replevin, for the Party's not being served with the Rule to reply, but having only an English Notice given of the Rule. Mr. Dawson on the other Side submitted it, that it is enough to enter the Rules for pleading in the Officer's Book. But that at least the Court would not set aside the Judgment, as the Party had fair Notice, that there was a Rule given in the Book to reply. However the Court thought this a plain Irregularity; and accordingly set the Judgment aside.

The King *and* The Bishop of Chester *and* others.

How far Li-
berty shall be
given to en-
ter up a
Judgment
Nunc pro
tunc.

MR. Fazakerly moved for Liberty to enter up a Judgment of Reversal, pronounced by the House of Peers so long ago as 10 W. 3. which was given upon a Judgment of this Court, affirming a Judgment of the Common Pleas in a Writ of Quare Impedit, wherein the King was Plaintiff, and in whose Favour the Courts below pronounced their Judgment. He said, he must own, that the Application was a very late one; but it was occasioned, by its not being discovered till very lately, that this Judgment of Reversal was not entered up. However if the Court could be fully satisfied, that there was such a Judgment pronounced, in all Conscience the Parties ought to have the Benefit of it. And in order to satisfy the Court of this, he produced the Transcript of the Record of this Court removed up into the House of Peers; which was signed by Lord Chief Justice Holt's own Hand; and likewise a Copy of the Judgment of Reversal, taken out of the Records, belong-
ing

ing to that House. He said, till the last Assizes at York they had never Occasion to make Use of it; but then a Return came down to Trial there, wherein the Trustees of Lady Stapleford claimed a Right to present alternatively, together with the Vest of one M^r. Peirce, who claimed as Patron of the whole Church in the former Quare Impedit. He said, they had given Notice of this Motion to the Attorney General who appeared for the King in that Suit; and therefore he hoped the Motion would be allowed. The Attorney General said, that he had Instructions to submit the Whole of this Matter entirely to the Discretion of the Court. Upon which the Court said, that they ought in this Case to proceed with some Caution; and before they would give Directions in a Matter of this Nature, they would have all the Parties before the Court, whom they thought, could possibly be affected by this Judgment. And therefore they thought, that Notice should be given of this to the Trustees of Lady Stapleford, and likewise to the Bishop of Chester. The Chief Justice said, he has known Judgments refused to be entered up when the Parties applied late; because that Purchaser might be affected. However the Court made a Rule to shew Cause in this Case, but ordered Service to be made of it upon all Parties who could be supposed to be interested in the Judgment.

Goodright, on the Demise of the Duke of Chandois *versus* Jennings.

IN a Writ of Error quod coram vobis upon a Judgment in Ejectment, Motion was made, that the Plaintiff in Error might assign his Errors within a short Day; and accordingly the Court gave but a Week.

Court will confine a Person to assign his Errors within a short Day.

When a Writ of Error quod coram vobis is brought

How far the

Ithers and Woodhouse.

IN a Writ of Error on a Judgment in Ireland, M^r. Parker moved that a Rule might be made upon the Plaintiff in Error to assign his Errors within a short Day; and accordingly the Court granted the Motion.

land; how far the Court will require the Party to assign his Errors within a short Day.

When a Writ of Error is brought upon a Judgment in Ireland

Woolaston and Walker.

THIS Action appeared to have been brought by an Administrator De bonis non pendente lite concerning the Probate of a Will, by an Executor. And now Sergeant Chappel argued, that no such Administration could be by Law; and relied principally upon the Case cited on the former Argument, which is reported in Moor and cited in Godolphin's Legacy 167. But admitting it might, yet no such Administrator could bring an Action At Common Law, the Ordinary himself could not, 2 Inst. 398. and undoubtedly therefore no Person, receiving the Decedent's Goods by his Authority could. The only Foundation

Vide ante 423.

tion therefore, upon which certain Administrators can do this at this Day, is the Statute of Edw. 1. but there are no Words in that Statute extending to these sort of Administrators. But in answer to the first of these Points, Mr. Parker cited 4 Mod. 14. 6 Mod. 304. and Salk. 42. And as to the second, he said it is allowed in 5 Rep. 29. that Administrators Durante minore Aetate may bring Actions; and in the Book before cited of 6 Mod. 304. that Administrators durante absentia may; and therefore he submitted it, there was equal Reason, that these Administrators may. But he said besides, it does not appear by this Declaration, that the first Will was ever proved, and if so, it cannot be proved now that Executor is dead. And consequently upon the Matter the first Person died Intestate. If this was so, it was clear the present Plaintiff might bring this Action; for it was never denied, but the Ordinary might grant Letters of Administration pendente lite concerning the Right of Administration. The Court said, that it was undoubtedly true, that no Will can be proved after the Death of an Executor. But they thought in the present Case the Probate shall be intended; because this is an Administration de bonis non. Then as to the other Points the Chief Justice with Judge Page and Mr. Justice Probyn seemed pretty clear of Opinion to affirm the Judgment. But Judge Lee doubted, upon the Authority of a Case in Carthew 153. where it is expressly resolved, that such Administration is void. Upon this the Matter was ordered to stand over.

Vide post.

Marshal and Charleton.

Vide ante
447.

THIS Matter coming on in the Paper again, Mr. Acherly said, he submitted it, that Billa & Narratio in this Court were the same thing. The Words of one and the other do not vary a Letter; and therefore he hoped, the Plea of the Defendant was in Bar. But if that should be given up, he submitted it, the Plea as a Plea in Abatement, was badly pleaded. For it is after a full Defence. The Party begins his Plea with a venit & defendit vim & injuriam quando, &c. and then says, petit judicium de Billa. And to this he cited Show. 443. But if this Point should be against him likewise, he said, this at most could be only a Discontinuance in the Plaintiff, and he hoped there should be no Costs. The Court said that they had found Authorities over and over in the Books, that this was a Plea in Abatement; and therefore would not allow that Point to be farther argued. To the second Point Mr. Reeves had taken a Distinction by Way of Answer; and said, he did agree, that if this had been a Plea to the Jurisdiction of the Court, or to the Disability of the Person of the Plaintiff, the Plea would have been begun wrong; but as the Substance of this Plea is, he hoped, this Beginning of it would not make it bad. However the Court said, this might be proper to be considered of; and therefore would not give any Opinion about it at present. But the Chief Justice said, if this Plea was imperfectly pleaded, though there was a Discontinuance in the Plaintiff.

Plaintiff, he believed Judgment must still be for him, and a Respondeas Ouster awarded. To this Purpose he cited the Case of Bonner and Hall, Hill. 9 W. 3. Rot. 558. The Defendant there pleaded, an Action depending in the Common Pleas for the same Matter, but pleaded his Plea wrong; the Plaintiff replied, no such Action depending, and concluded in Bar; upon this the Defendant demurred in Abatement, and the Plaintiff joined in Demurrer. In that Case it was insisted for the Defendant, that the Plaintiff had discontinued his Suit; and therefore there could be no Judgment awarded, Quod Respondeas Ouster. And the Case of Biss and Harcourt was cited, where the Defendant pleaded an Attainder of the Plaintiff in Abatement; the Plaintiff replied a Pardon, and concluded in Bar, to which there was a Demurrer; and held to be a Discontinuance. Upon which Lord Holt took the Distinction between where the Defendant's Plea is bad, and where not; and accordingly gave Judgment Quod Respondeas Ouster. And in the Case of Lug and Godwyn, Mich. 10 W. 3. the same Distinction was taken. Then as to the Matter of Costs, the Chief Justice said, if the Distinction that he had mentioned, was not to be allowed in this Case, here was an absolute Discontinuance in the Proceedings. For which Reason there could be no Judgment given at all; and consequently no Costs against the Plaintiff. But if he prayed Leave of the Court to discontinue; then he must pay Costs. However the Plaintiff did not do that. For which Reason this Matter was ordered to stand farther over. Vide post

Grace and Higham.

IN an Action upon a Promissory Note, brought by an Indorsee against an Indorser, the Defendant pleaded a Certificate upon a Commission of Bankruptcy in Bar. But upon Evidence it appeared that the Certificate was made upon a joint Commission of Bankruptcy taken out against the Defendant and his Brother, who were Partners in Trade. And whether this Evidence supported the Issue, was a Question, that came now before the Court, upon a Case made at the Trial. Mr. Strange argued, that it did not; and said, that the only Statute, that the Defendant could put their Case upon, was 5 Geo. I. 24, (14). The Words are, That any Person or Persons, who shall become a Bankrupt, and pursue the Terms of that Clause, may plead, that he, she or they became Bankrupts to any Action, that shall be brought against them for Matter arising before their Bankruptcy. But he submitted, that those Words might well be construed, reddendo singula singulis, viz. he or she shall be discharged upon a Commission separately taken out against him or her; and they, that is, joint Debtors shall be discharged upon a Commission jointly taken out against them. And if the Intent of the Parliament had been otherwise, the Words would have been explained in this Manner, against them or either of them. But what he urged, determined this Construction, was, that he submitted it, the separate Creditors could not be let in to have any Part

What will be good Evidence relating to Bankruptcy.

of the Estate upon the joint Commission. But Mr. Fazakerly argued on the other Side; and said, he apprehended, the separate Creditors to each Bankrupt might be let in upon the joint Commission; though he did allow, that they should have no Share of the Bankrupt's Effects, till the joint Creditors should be all satisfied. In fact, he said, every Act of Bankruptcy is Personal to a Man's self; and properly speaking there is no such Thing as an Act of Bankruptcy joint with another. And he apprehended it to be known and certain, that if one Partner only becomes a Bankrupt, the joint Estate shall be divided in such Case, as well as the separate One. In the Case of Mackenson and Parker, 23 December 1728. a Petition came on before the Lord Chancellor, on the Behalf of Peter Delamot. There was a separate Commission taken out against Parker only; and a Petition by a Creditor on the Partnership-Estate. The Order pronounced was, that the Partnership-Estate should be divided amongst the Partnership-Creditors in the first Place; and if there should be any Surplus of this Estate due to the Bankrupt, that that Surplus together with his separate Estate should be divided amongst his separate Creditors; that on the other Hand the separate Estate should in the first Place be divided amongst the separate Creditors, and if there should be any Surplus from that, that that Surplus together with the Partnership-Estate should be divided among the Partnership-Creditors. And he said, in the very Case of the two Highams a Petition was preferred before the Lord Chancellor 22 April 1729, on the Behalf one Horsey, a Creditor on the separate Estate of this Defendant. And there, though this very joint Commission was depending, the Chancellor ordered, that the separate Creditors might prove their Debts from Higham, senior, and be admitted Creditors; but the Partnership-Estate should be divided in the first Place amongst the Partnership-Creditors. And another Case in 2 Ver. 706. was cited to the same Purpose. The Court thought this a Matter proper to be considered of farther; and accordingly it was put off to another Day.

A

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